Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

FEDERATED PUBLICATIONS, INC.,
Petitioner

v.

HONORABLE BYRON L. SWEDBERG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

1. Whether it is constitutional under the First and Fourteenth Amendments for a court to require the press to sign "agreements" to follow specified guidelines in reporting on hearings.

2. Whether a court may condition admission to a courtroom on the press' "agreement" to sacrifice its First Amendment rights.

3. Whether a requirement that the press agree to follow specified guidelines in reporting on a hearing is a "reasonable limitation on access" to a public court proceeding.

4. Whether a court, consistent with the First and Fourteenth Amendments, may exclude members of the press from a hearing while allowing attendance by the rest of the public.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Petitioner, Federated Publications, Inc., respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on September 3, 1981.

OPINION BELOW

The opinion of the Washington Supreme Court is reported at 96 Wn.2d 13 (1981), and is in the Appendix at A-1 through A-18.

JURISDICTION

The judgment of the Washington Supreme Court was entered on September 3, 1981. A timely motion for reconsideration was denied on December 24, 1981, and the petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether it is constitutional under the First and Fourteenth Amendments for a court to require the press to sign "agreements" to follow specified guidelines in reporting on hearings.

2. Whether a court may condition admission to a courtroom on the press' "agreement" to sacrifice its First Amendment rights.

3. Whether a requirement that the press agree to follow specified guidelines in reporting on a hearing is a "reasonable limitation on access" to a public court proceeding.

4. Whether a court, consistent with the First and Fourteenth Amendments, may exclude members of the press from a hearing while allowing attendance by the rest of the public.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the portions of the First and Fourteenth Amendments to the Constitution of the United States which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Imposition of the Order Requiring an Agreement to Report on the Court Proceedings Only in Accordance with the Guidelines.

The State of Washington charged Veronica Compton with attempted murder. The defendant Compton moved to exclude the public and press from omnibus and suppression hearings in the Superior Court of Whatcom County before the Honorable Byron Swedberg and to seal certain portions of the records of those hearings. The Prosecuting Attorney for Whatcom County joined in the motions for closure and sealing.

Federated Publications, Inc., doing business as the Bellingham Herald (hereinafter "the Herald"), objected to the proposed closure of the hearings under the United States and Washington Constitutions. (The listing of parents, subsidiaries and affiliates required by Rule 28.1 is in the Appendix at A-22.) Judge Swedberg denied the motion for closure, but *sua sponte* requested that members of the press wishing to attend the hearings sign the following "agreement" to follow the Washington Bench-Bar-Press Guidelines[1] in their reports of the proceedings:

> BENCH-BAR-PRESS GUIDELINES FORM
>
> This form is for the use of all media representatives planning to attend the hearing in *State v. Veronica Lynn Compton,* Whatcom County Cause No. 80-1-00322-7, to be held at 1:30 p.m. in Department No. 2 of the Whatcom County Superior Court on the 19th day of December, 1980.
>
> 1. I have read the Bench-Bar-Press Guidelines of 1974 which are attached to this form.

[1] The Washington Bench-Bar-Press Guidelines are found in the decision of the Washington Supreme Court in the Appendix at A-11 through A-14. They were first drafted by a committee of some members of the bar and press in the 1960's and thus do not address the issue of closure. Thirty-one other states in the country have comparable guidelines that are voluntarily supported by the press, in conjunction with members of the judiciary and bar, as part of a cooperative effort to insure coverage of judicial proceedings.

2. If I have not yet read the Bench-Bar-Press Guidelines that are attached to this form, I shall do so before I report in any manner on the hearing of the above-mentioned matter.

3. I agree to follow the Bench-Bar-Press Guidelines of 1974 in any reporting of the proceedings in the above-captioned matter at the hearing scheduled on the 19th day of December, 1980, in Department No. 2 of the Whatcom County Cause No. 80-1-00322-7, to be held at 1:30 p.m.

4. As a representative of , I am authorized to bind my news agency to follow the Bench-Bar-Press Guidelines.

DATED this day of December, 1980.

.....

(Signature)

Any members of the press not willing to sign the form, prepared by the judge, or not willing to attend solely as nonreporting members of the "public," were excluded from the hearings. No limitations were placed upon the general public, either as to their attendance at the hearing or as to what they might say to others about the hearing.

Some members of the press signed the form. The Herald did not, although it noted in oral argument that it voluntarily followed the Guidelines as a general editorial policy. Because of its unwillingness to sign the form, the Herald was excluded from the hearings.

II. Federal Questions Presented to and Rejected by the Washington Supreme Court.

The Herald commenced an original mandamus action in the Washington State Supreme Court to challenge Judge Swedberg's actions in requiring members of the press to either sign the "agreement" or be excluded from the hearings. Because Judge Swedberg had denied the closure motions, the

Herald did not raise issues concerning the propriety of the proposed closure of hearings. It argued that the "agreement" operated as an unconstitutional prior restraint on publication and that exclusion of the members of the press who would not agree to follow the Guidelines was unconstitutional under the First and Fourth Amendments to the United States Constitution. The Washington Supreme Court reviewed Judge Swedberg's actions, although the case was technically moot, because it found them capable of repetition, yet escaping review.

The Washington Court considered the Herald's constitutional arguments, but rejected them because it found *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), to be distinguishable. 96 Wn.2d at 19-22; Appendix at A-7 through A-10. Relying on *Richmond Newspapers Inc. v. Virginia,* 448 U.S. 555 (1980), the court found Judge Swedberg's conditions on entry to the courtroom to be merely "reasonable limitations on access . . . ." *Id.* at 22, 23; Appendix at A-10 through A-11. Thus, the Herald's claims under the United States Constitution were squarely presented to the Washington Supreme Court and rejected by it.

REASONS FOR GRANTING WRIT

I. The Decision Below Sanctions a Prior Restraint in Conflict with *Nebraska Press Association v. Stuart.*

Although there has been considerable controversy in the lower courts [2] over the appropriate interpretation of this Court's seminal rulings in *Richmond Newspapers, Inc. v. Virginia, supra,* and *Gannett Co. v. Depasquale,* 443 U.S. 368 (1979), one benchmark has remained constant: the courts in certain circumstances may exclude the public and press from hearings, but they may not dictate to the press how those proceedings are to be reported to the public.

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[2] See, e.g., Sacramento Bee v. District Court, 656 F.2d 477 (9th Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3717 (Docket #81-1563); *United States v. Powers,* 622 F.2d 317 (8th Cir.), *cert. denied,* 444 U.S. 387 (1980).

Mr. Justice Powell, concurring in *Gannett* v. *DePasquale*, 443 U.S. at 399, emphasized the distinction between closure orders and impermissible prior restraints:

> Excluding all members of the press from the courtroom, however, differs substantially from the "gag order" at issue in *Nebraska Press*, . . . [that] applied to information irrespective of its source. In the present case . . . we are confronted with a trial court's order that in effect denies access only to one, albeit important source. It *does not in any way tell the press what it may and may not publish.*

(Emphasis added.) The order below, however, does indeed, tell the press "what it may and may not publish." It may publish matters that are consistent with the Guidelines; it may not publish matters in violation of them. Further, it applies "irrespective of . . . source." By the terms of the order, the attendees were "to follow the . . . Guidelines . . . in *any* report of the . . . hearing." *See also Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (striking down state court injunction prohibiting news media from publishing name or photograph of juvenile); *Nebraska Press Association v. Stuart*, *supra* (unconstitutionality of gag order concerning coverage of pre-trial hearing).

The decision below thus disregards this benchmark and the fundamental prohibition of governmental control of the content of speech. It seeks to accomplish through judicial control over access to criminal hearings what this Court has held may not be accomplished—*i.e.*, judicial control over the content of press reports.[3]

Nor is the decision below an isolated instance. In *Sacramento Bee v. District Court*, 656 F.2d 477, 482 (9th Cir. 1981),

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[3] The decision below is in direct conflict with the decisions of this Court, particularly the decision in *Nebraska Press Association v. Stuart*. Thus, summary reversal might be appropriate if this Court concludes full argument is unnecessary.

petition for cert. filed, 50 U.S.L.W. 3717 (1982) (Docket #81-1563), the Ninth Circuit suggested that a trial court in circumstances comparable to Judge Swedberg's should seek the agreement of the press concerning the "timing and scope of coverage," rather than closing a criminal trial. The *first* alternative to closure was to be an acknowledgement by the press "that immediate publication was unnecessary . . . ." *Id.*

Similarly, the first published draft of proposed amendments to the Federal Rules of Criminal Procedure would include a provision allowing a "partial closure" of a hearing as follows:

> Whenever the court could otherwise order closure . . . , it may limit the persons permitted to attend and *condition such attendance upon agreement to the court's order restricting the time at which the person in attendance may disclose to others matters occurring at the proceeding or portion thereof partially closed.*

30 Crim. Law Rep. 3001 (1981) (emphasis added).

The decision below, and these other developments, justify issuance of a writ of certiorari to determine whether the decisions of this Court in *Nebraska Press, Gannett,* and *Richmond Newspapers* are being correctly interpreted as a grant of authority to control what is published about trials.

A. The Decision Below Sanctioned an Order The Purpose and Effect of Which Was to Control the Content of Speech.

Judge Swedberg's order required members of the press to sign an agreement dictated by the judge to "*follow the Bench-Bar-Press Guidelines* in any reporting of the proceedings," and "to *bind* my news agency to follow the Bench-Bar-Press Guidelines." (Emphasis added.) Judge Stuart's order leading to this Court's decision in *Nebraska Press Association v. Stuart, supra,* prohibited the "news media" from "disseminat[ing] any information concerning this matter . . . *other than as set forth in the Nebraska Bar-Press Guidelines.*" 427 U.S. at 575 (Brennan, J. concurring) (emphasis added).

Both Judge Stuart's order and Judge Swedberg's order were entered in anticipation of preliminary hearings, and both attached copies of the state guidelines to the order. *Nebraska Press Association v. Stuart*, 423 U.S. 1327 (opinion of Blackmun, J. on Motion for Stay). Both orders aimed to control what pretrial information would be published by the press. Both attempted to incorporate voluntary "guidelines" in the terms of the order.[4] Both *permitted* publication only if consistent with the state guidelines; the guidelines, themselves, both were permissive, not mandatory, in nature.

In granting a stay of Judge Stuart's order, Mr. Justice Blackmun ruled:

> The most troublesome aspect of the District Court's restrictive order is its wholesale incorporation of the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation. . . . . They are merely suggestive and, accordingly, are necessarily vague. To cite only one example, they state that the publication of an accused's criminal record should be considered very carefully and should generally be avoided. *These phrases do not provide the substance of a permissible court order in the First Amendment area.*

423 U.S. at 1331.[5] The Nebraska Supreme Court, too, ruled against incorporation of the Guidelines:

> We conclude that an order of the district court of October 27, 1975 is void insofar as it incorporates the voluntary guidelines and in certain other respects, in that it impinges too greatly upon freedom of the

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[4] The *Nebraska Press* orders also listed specific matters which could not be published by the press. 427 U.S. at 542-44. The Nebraska Bar-Press Guidelines bear a close resemblance to the Washington Bench-Bar-Press Guidelines.

[5] The Washington Bench-Bar-Press guidelines include substantially the same vague language as Mr. Justice Blackman's example. *See e.g.*, Guideline 3, Appendix at A-12. ("The public disclosure of [prior criminal charges and convictions] may be highly prejudicial. . . . The publication of such information should be carefully reviewed.")

> press. *The guidelines were not intended to be contractual, and cannot be enforced as if they were.*

State v. Simants, 194 Neb. 783, 236 N.W.2d 794, 805 (1975) (emphasis added).

Because of the stay granted by Mr. Justice Blackmun and the Nebraska Supreme Court's own ruling against incorporation of the state guidelines, the order that finally reached this Court for full consideration had been purged of reference to the Bar-Press Guidelines. This Court, nevertheless, addressed their incorporation into the order. The first two footnotes of the Court's opinion described the voluntary Guidelines in some detail and noted "Mr. Justice Blackmun's careful decision" staying the order "insofar as it incorporated the admonitory Bar-Press Guidelines and prohibited reporting of some other matters." 427 U.S. at 542-44 n.1, 2. Mr. Justice Brennan, concurring, addressed the voluntary nature of the Guidelines in greater detail, and emphasized that the decision to follow the Guidelines was solely a matter for the press: "[T]he decision of what, when, and how to publish is for editors, not judges." *Id.* at 613. He concluded that "[e]very restrictive order imposed in this case was an unconstitutional prior restraint on the freedom of the press. . . . " *Id.*

The rejection by this Court and the Nebraska Supreme Court in *Nebraska Press* of the effort to bind the press to the terms of voluntary Guidelines, is flatly at odds with the decision of the Washington Supreme Court.

B. The Decision Below Fails in Its Attempt to Distinguish *Nebraska Press.*

The decision below makes much of the voluntary nature of the Bench-Bar-Press Guidelines in an attempt to distinguish Judge Swedberg's order from the orders before this Court in *Nebraska Press.* 96 Wn.2d 20-22, Appendix at A-8 through A-10. The argument relies on an assumed commitment on the part of the press to support the Guidelines. If the press supports such guidelines and subscribes to their language, why should they not be made mandatory by court order? Such an argument, however, has already been rejected by both this Court and the Nebraska Supreme Court.

As Mr. Justice Brennan noted in his concurrence to *Nebraska Press*, voluntary support by the press of the Guidelines does not justify a court order to the press to follow the Guidelines. 427 U.S. at 613. The Nebraska Supreme Court, too, found that such voluntary support could not transform Guidelines into a binding contract enforceable by the courts. *State v. Simants, supra*, 236 N.W.2d at 805. Indeed, the very purpose of such guidelines—to encourage cooperation among the press, bar and judiciary—is destroyed when they are so used by the courts.[6]

The Washington Supreme Court also placed reliance on the alleged absence of "sanctions" against any person who signed and then violated the "agreement" to follow the Guidelines. 96 Wn.2d at 22, Appendix at A-10. This reliance, however, overlooks the real purpose and effect of Judge Swedberg's order and gives too much weight to the possible absence of the contempt sanction.[7]

Judge Swedberg's purpose in entering the order clearly was to cause *restraint* in publication of matters relating to the pre-trial hearing, and to *prohibit publication* of such matters by those who were unwilling to agree to the restraint. Otherwise the order and agreement would be nullities.

The Guidelines do represent an acknowledgment by the press of its role in protecting the rights of the accused, and they do have a substantial impact on the manner in which newspapers cover criminal proceedings. But when this voluntary commitment is incorporated into an agreement with an officer

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[6] The effects of this decision below on this cooperative process can already be seen. The major media organizations in Washington State are currently considering withdrawal of their support from the Guidelines.

[7] This Court must make its own examination of the "substance" and purpose of Judge Swedberg's order to determine its actual "operation and effect." *Near v. Minnesota*, 283 U.S. 697, 708 (1931). The ability of this Court to look at the *actual* purpose and effect of government actions to determine if they *function* as prior restraints is a corollary to the general rule that this Court may make an independent examination of the facts found below to determine if constitutional rights are being violated. *See, e.g., Cox v. Louisiana*, 379 U.S. 536, 544, n.8 (1965); *New York Times v. Sullivan*, 376 U.S. 254, 284, 285 (1964), *Fiske v. Kansas*, 274 U.S. 380 (1927).

of the State, a Superior Court Judge, the Guidelines are bound to become mandatory in effect. A reporter who signs such a written "agreement" with a trial judge is under heavy pressure not to violate that document or the Guidelines. To assume that a reporter and editor would violate such an undertaking assumes that the press knowingly would go back on its word.

The threat of sanctions need not take the form of a direct threat of contempt to have this effect. The prospect of future encounters with the same judge, the probability of increased courtroom closures and restricted access to information, and even the probable loss of cooperation of the judge and his staff, are all sufficient inducements growing out of the judge's inherent position of authority in matters relating to court proceedings.[8]

Although the decision below suggests that contempt of court might not be an appropriate sanction, the press must logically conclude that under such an order anything they publish about the proceeding will be at its peril. If a member of the "public" who attends the trial and is not bound by the court-drafted agreement advises a journalist as to what occurred, may it be published? If the same member of the public gives a speech adverting to what occurred in court, may the press then print it? If one "non-cooperating" newspaper publishes what occurred in court, may those that sign the "agreement" then do so? In all such situations—and in the myriad variations likely to arise—if a court believed the "agreement" had been violated, it would be expected to respond in some fashion. The situation could well lead to examination of the reporter and editor as to their sources and decision to report in a manner contrary to the judge's interpretation of the Guidelines. That this should be the result of the efforts at accommodation between the press and the courts embodied in

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[8] The decision below recognizes that the Herald or other members of the press might be "punished" for "violations" of the Guidelines by exclusion from the courtroom in the future. One basis for Judge Swedberg's order requiring a written agreement to follow the Guidelines at the Compton hearings was his experience of previous "violations" of the Guidelines by the Herald. 96 Wn.2d at 21, Appendix at A-9.

voluntary press-bar guidelines would be utterly self-defeating as well as contrary to the First Amendment.

The decisions of this and other courts show, in addition, that the threat of the contempt sanction is not a prerequisite for a finding of a prior restraint.[9] In *Nebraska Press,* only members of the press who had intervened directly in the criminal action were subject to the court order. 427 U.S. at 556, n.9. Yet, this Court analyzed the orders as prior restraints. Similarly, in *Keene Publishing Corp. v. Cheshire County Superior Court,* 119 N.H. 710, 406 A.2d 137 (1979), the New Hampshire Supreme Court found an impermissible prior restraint in a court's requirement that, *as a condition on access to a pre-trial hearing,* a newspaper consult with its attorney regarding the manner of coverage. The apparent "form" of such an order does not control, when its "substance" is a prior restraint. *Near v. Minnesota,* 283 U.S. 697, 708 (1931).

Even without practical or implied sanctions, Judge Swedberg's order itself provided punishment for those members of the press who did not agree to report on the proceedings as Judge Swedberg wished. The order did not merely require those who wished to attend to sign the agreement; it *excluded* those members of the press who would not agree to follow the Guidelines. The excluded members of the press were thus subjected to a severe sanction solely because they would not agree to report as the judge wished. They were denied entry to an important, otherwise public proceeding in an ongoing and significant criminal trial.[10] Those who *did* attend were made aware they might later be excluded from the courtroom if they did not follow the Guidelines.

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[9] The facial invalidity of the order also would not preclude application of the contempt sanction by a court that felt its authority had been ignored. *See Walker v. Birmingham,* 388 U.S. 307 (1967).

[10] If the portion of Judge Swedberg's order excluding the press who would not sign the agreement is viewed in isolation, it might be analyzed as a form of "subsequent punishment" imposed on those who would not agree to report as the court wished. Such subsequent punishment, nonetheless, would be unconstitutional under this Court's decisions in *Smith v. Daily Mail Publishing Co.,* 442 U.S. 97 (1979), and *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978).

The arrangement established by Judge Swedberg bears all the hallmarks of a classic licensing scheme in which the censor denies permission to publish because of the content of the publication. The "license" here takes the anticipated form of permission to enter the courtroom. If the press is willing to abide by the government's wishes, it is granted permission to enter. But if the press refuses, it is denied the government's permission. The "operation and effect" of the order, therefore, is to establish an unconstitutional prior restraint. *See Near v. Minnesota,* 283 U.S. 697, 708 (1931). *Cf. University of Southern Mississippi, MCLU v. University of Southern Mississippi,* 452 F.2d 564 (5th Cir. 1971) (restriction on access to facilities based on anticipated content of speech as prior restraint).

This Court should prevent such erosion of the prohibitions against government control of speech and the press. The power of courts to control access to courtrooms cannot be allowed to extend to control of the contents of reports of proceedings. Otherwise, this Court's careful distinction between control over access and control of content will be destroyed.

II. Conditioned Access to the Courtroom Creates an Unconsitutional Condition.

The rationale underlying the decision below, and other recent developments concerning the concept of "partial closure," is expressed in the following excerpt from the opinion of the Washington Supreme Court:

> Inasmuch as the court had the authority. . .to exclude all of the public, including the media, it had also the included power to impose reasonable conditions upon attendance.

96 Wn.2d at 22, Appendix at A-10.

This assumption, that the government's general power to withhold a privilege, such as attendance at a hearing, automatically includes the lesser power to impose conditions on the grant of the privilege, may have some precedent, and may be correct if the conditions imposed do not require sacrifice of or a penalty on the exercise of constitutional rights. But the

condition imposed here—an agreement to speak only as the court wishes—violates the decisions of this Court which establish the doctrine against unconstitutional conditions. *See generally,* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968); Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 Colum. L. Rev. 321 (1935).

This Court's recognition of the power of the courts to close courtrooms inevitably raises recurring questions highlighted by the decision below.[11]

Because a court has what it believes to be the greater power to exclude the public and press from a pre-trial hearing, does it have the supposedly lesser power to allow the press to attend the hearing only on the condition that the press will report on the proceeding according to the court's wishes?

Must the constitutional right to publish freely be sacrificed in order to have the privilege of attendance at judicial proceedings?

May a court penalize members of the press who do not agree with the court by excluding them from the hearing?

The fundamental principles enunciated in this Court's decisions require a negative answer to each of these questions.

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon

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[11] The unconditional conditions doctrine raises special problems here. The "privilege" of attending public court proceedings has constitutional dimensions unlike, for instance, the "privilege" to receive welfare benefits. Under any construction of *Depasquale* and *Richmond Newspapers,* attendance at court proceedings cannot be characterized as a "privilege."

The apparently "lesser" power to condition access on the agreement to report on the proceedings according to the Court's wishes, in fact, raises greater constitutional problems than does the general authority to close criminal proceedings. Moreover, the decision below does not show that the "greater" power to close was present. *See* pp. 20, 21, *infra.*

> which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—*especially his interest in the freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall,* 357 U.S. 513, 526. Such interference with constituional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (emphasis added).

The prohibition against unconstitutional conditions has its roots in cases such as *Speiser v. Randall,* 357 U.S. 513 (1958) and *Sherbert v. Verner,* 374 U.S. 398 (1963). *Speiser* affirmed that the State could not require the sacrifice of a constitutional right, the right to speak freely and criticize the government, in exchange for the grant of a tax exemption. Similarly, *Sherbert* held that the government could not require a Seventh-Day Adventist to give up her religious freedom in exchange for unemployment compensation. *See also Elrod v. Burns,* 427 U.S. 347 (1976) (recipients of government jobs cannot be required to sacrifice constitutionally protected speech and associational rights).

The principle underlying all these cases is a simple one. Even though the government may deny privileges to everyone, it may not selectively penalize those who choose to exercise constitutionally protected rights or grant them only to those who sacrifice their rights; *cf. Harris v. McRae,* 448 U.S. 297, 317 n.19 (1980) ("[S]ubstantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom. . . .").

Judge Swedberg's order violates both branches of this prohibition. Those members of the press who sign the agreement have sacrificed their rights in exchange for the privilege of

entry to the hearing. Those members of the press, who, like the Herald, do not sacrifice their rights, are penalized by exclusion from the hearing.

III. The Exclusion of Members of the Press Based on the Content of Their Publications Is Not a "Reasonable Limitation on Access" Comparable to a Time, Place and Manner Restriction.

The Washington Supreme Court relies heavily on the proposition that a trial court may impose "reasonable limitations . . . upon attendance at a judicial proceeding . . ." to uphold Judge Swedberg's order. 96 Wn.2d at 22, Appendix at A-10. In support of this proposition, it quotes from the opinion of the Court in *Richmond Newspapers, Inc. v. Virginia:*

> Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, *see, e.g., Cox v. New Hampshire,* 312 U.S. 569 (1941), so may a trial judge in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

Id. at 22, 23, *quoting Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 581, n.18. [12]

A. Reasonable Limitations on Access Must be Content Neutral.

The Washington Court's reliance on *Richmond Newspapers* is completely misplaced and fundamentally misconceives the principles defining reasonable time, place, and manner restrictions. An examination of the entire footnote relied upon reveals that the "reasonable limitations" approved by this Court in *Richmond Newspapers* are at a polar extreme from the restriction on content approved by the Washington Court.

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[12] The Washington Supreme Court incorrectly identified the quote as coming from the concurring opinion of Mr. Justice White.

> We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, *cf., e.g.,* 6 J. Wigmore, Evidence § 1835 (J. Chadburn rev. 1976), but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, *see, e.g., Cox v. New Hampshire,* 312 US 569, . . . (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. "[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." Id., at 574, ... It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets. *Compare, e.g., Kovacs v. Cooper,* 336 US 77, . . . (1949), with *Illinois v. Allen,* 397 US 337, . . . (1970), and *Estes v. Texas,* 381 US 532 . . . (1965). Moreover, since courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives. *Cf. Gannett,* 443 US, at 397-398, . . . (Powell, J., concurring); *Houchins v. KQED, Inc.,* 438 US 1, 17, . . . (1978) (Stewart, J., concurring in judgment); *id.,* at 32, . . . (Stevens, J., dissenting).

448 U.S. at 581, n.18.

The substance of the footnote is that courts may impose restrictions such as are necessary to avoid overcrowding or

disorderly conduct.[13] Nothing in it sanctions "limitations" that are based on the content of an attendee's speech. Indeed, the quote from *Cox v. New Hampshire* emphasizes that reasonable limitations cannot be used "to deny or unwarrantedly abridge" communication. Similiarly, *Kovacs v. Cooper* and *Estes v. Texas* related to actual disruption, noise and disorder. They did not involve attempts to control the content of reports about judicial proceedings.

The analogy to "time, place, and manner restrictions" highlights the fundamental error of the decision below. The essence of such restrictions is that they have no relationship to the content of speech and are not applied to discriminate against speakers whose views are less acceptable to the government. *See generally* L. Tribe, *American Constitutional Law* §§ 12-2, 12-3 (1978). This principle of content neutrality is enunciated in numerous cases of this Court, several of which spell out the crucial distinction between improper, content sensitive restrictions, and acceptable, content neutral regulations of time, place and manner. The decision below violates the principle by sanctioning a content sensitive restriction.

> [W]hile a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, *see Cox v. New Hampshire*, 312 U.S. 569, 86 L. Ed. 1049, 61 S. Ct. 762, 133 A.L.R. 1396, *Poulos v. New Hampshire*, 345 U.S. 395, 97 L. Ed. 1105, 73 S. Ct. 760, 30 A.L.R.2d 987, and may even forbid altogether such use of some of its facilities, *see Adderley v. Florida*, 385 U.S. 39, 17 L. Ed. 2d 149, 87

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[13] Such regulations on access to courtrooms have been limited to excluding spectators who threatened witnesses or disrupted the courtroom or dealing with problems of overcrowding. *See, e.g., Nebraska Press Association, supra*, at 544 (trial court also "set out a plan for attendance, seating and courthouse traffic control during the trial"); *United States ex rel. Bruno v. Herald*, 408 F.2d 125 (2d Cir. 1969), *cert. denied*, 397 U.S. 957 (1970) (closure granted to protect witnesses); *United States ex rel. Smallwood v. Lavalle*, 377 F. Supp. 1148 (E.D.N.Y.), *aff'd*, 508 F.2d 837 (2d Cir. 1974), *cert. denied*, 412 U.S. 920 (1975) (trial closed during testimony of witness who feared reprisal).

> S. Ct. 242; what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression, *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 33 L. ed. 2d 212, 92 S. Ct. 2286.

Hudgens v. NLRB, 424 U.S. 507, 520 (1976). This Court recently applied these prohibitions in *Carey v. Brown,* 447 U.S. 457 (1981), and found unconstitutional a statute that improperly differentiated between kinds of speech in its regulation of picketing. The statute was content sensitive under the principles of *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95-96 (1972):

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment, *a government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wanting to express less favorable or more controversial views. . . .* Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

447 U.S. at 463. (Emphasis added.)

Reliance on such cases is especially appropriate in light of this Court's recognition that the courtroom is a public forum. *See Richmond Newspapers,* 448 U.S. at 577, 578. The courtroom is a forum for expression and receipt of communication and cannot be closed to those who would express themselves in a manner contrary to a court's wishes.

Because of the recent and recurring nature of such problems and the substantial number of courtroom closures which may produce similar difficulties, review by this Court at this

time is essential to ensure that "reasonable limitations on access" are not confused with control of content.

B. Imposition of Content Sensitive Limitations on Access Cannot Become the Preferred Alternative to Closure.

The constitutional problems described above are exacerbated by the cursory treatment given by the decision below to other alternatives available to avoid closure. The Washington Court dismissed the alternatives to closure with a litany of speculative problems that might be found in any case.

Continuance of the hearing was found to be inappropriate because of the likely delay, although every continuance inevitably causes delay. Severance was found unhelpful because "[i]t may operate to the disadvantage of the prosecution in presenting its case"; such a comment can be made about any severance. A change of venue "entails inconvenience of witnesses, counsel and the court itself . . . ," but such "inconvenience" does not have the constitutional stature of the rights being abridged. An intensive voir dire was found to "engender resentment;" thus one of the best alternatives to closure is eliminated. Sequestration works only if the hearing is held so close to the trial date that trial preparation is disrupted; again, disruption of schedules assumes constitutional importance. Finally, jury admonitions possibly "may tend to focus the attention of the jurors" on the allegedly prejudicial material; this "possibility" removes another valued tool of a trial judge and again may exist in every case. 96 Wn.2d at 16-18; Appendix A-4 through A-6.

To avoid the "inconveniences" inherent in these alternatives, the trial judge chose an order that raises substantial constitutional difficulties. As a result, an order to the media requiring adherence to the Guidelines becomes the preferred alternative. *Cf. Sacramento Bee v. District Court, supra,* (request to press on "timing and scope" of coverage is preferred alternative). Such a preference, and the treatment of the other alternatives, is entirely inappropriate under this Court's decisions. *See Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at 563 (other alternatives available that do not raise con-

stitutional problems); *Gannett v. DePasquale, supra,* 443 U.S. at 401 (Powell, J., concurring) (consideration of such alternatives first); *Richmond Newspapers v. Virginia,* supra, 448 U.S. at 581 (other alternatives preferable to closure). Closure of the courtroom, or such orders that control the media's reporting on court hearings, at least, should be imposed only after a careful and genuine consideration of other alternatives that have less impact on First Amendment rights.

IV. Exclusion of the Press, But Not the Rest of the Public, Violates the First and Fourteenth Amendments.

Judge Swedberg's order also discriminates based on the *means* of communication because it applies only to members of the press, not to members of the "public." Under the terms of the order, any private individual could have viewed the proceedings and told the public every detail by speaking from a soapbox, while the press may only report according to the Guidelines. Any member of the "public" may attend the hearing, tell the press who did not "agree" to follow the Guildines what occurred, and the press apparently may report that information.

Judge Swedberg's order thus violates the basic precept that the press "enjoy[s] the same right of access as the public. . . ." *Richmond Newspapers v. Virginia, supra,* 448 U.S. at 572-73. *See also id.* at 586 n.2 (Brennan & Marshall, J.J., concurring) ("the media's right of access is at least equal to that of the general public"). Access to information controlled by the government simply may not be granted on a discriminatory bass. *See Pell v. Procunier,* 417 U.S. 817, 834 (1974) (press and public to have equal rights of access).

The premise of this order is that the publication by the press should be *more* restricted, because it is more effective in reporting public events.[14] This premise is irreconcilable with the

[14] The different treatment of the "public" also reveals the importance placed by the decision below on the press' general commitment to the Guidelines. The public had not participated in preparation of the Guidelines, while the press had. Thus, it was felt appropriate to enforce the Guidelines as a contract against the press, but not the rest of the public.

recognized role and responsibility of the press to act as surrogate for the public in observing court proceedings. *See Richmond Newspapers v. Virginia, supra,* 448 U.S. at 572-73.

This precept not only flows inevitably from the First Amendment, but also is a requirement of the Equal Protection clause of the Fourteenth Amendment. *See Police Dept. of Chicago v. Mosley, supra* (applying both First Amendment and Equal Protection principles); Karst, *Equality as a Central Principle in the First Amendment,* 43 U. Chicago L. Rev. 20 (1975) (conjunction of First Amendment and Equal Protection principles). Such an unequal application of government action requires especially strict scrutiny because it impinges on fundamental First Amendment rights. *See generally* L. Tribe, *supra,* § 167 at 1002, 1003.

The unequal treatment of the "press" and "public" cannot survive scrutiny. The violation by the decision below of these established doctrines, in itself, would be grounds for summary reversal.

Finally, exclusion of the press but not the public fails to achieve the very purpose for exclusion. Members of the public could attend the hearing and be interviewed by the excluded members of the press, which could publish information with impunity. Indeed, a member of the "public" could attend, and then launch a telephone campaign, describing to potential jurors the allegedly most prejudicial evidence. *Cf. Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at 567 (information distributed by rumor, even with gag order on press). Would a broadcast interview of a member of the attending "public" by a member of the press who signed the "agreement" violate the court's order? Would publication of a wire service story from another source by a member of the press bound by the "agreement" violate the court's order? The order fails to survive even the most minimal scrutiny, let alone the exacting scrutiny required under the Equal Protection Clause, as it would not accomplish its purpose—to control allegedly prejudicial publicity. *See Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at 566, 567 (assessment of probable efficacy of restraint); *Smith v. Daily Mail Publishing Co.,* 442 U.S. 97, 104, 105 (1979)

(statute failed to "accomplish its stated purpose" because of differing treatment of newspapers and broadcast media).

These practical difficulties in enforcing such an order illustrate the morass into which the decision below would thrust the courts. Such problems of enforcement and discriminatory impact are the inevitable results of any system which puts the court in a censor's role. *See* Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp. Problems 648 (1955) (considerations underlying prohibition against prior restraint include administrative and enforcement problems).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Washington Supreme Court.

DATED this 23rd day of March, 1982.

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Appendix

[No. 47453-2. En Banc. September 3, 1981.]

FEDERATED PUBLICATIONS, INC., *Petitioner*, v. BYRON L. SWEDBERG, *as Judge of the Superior Court for Whatcom County, Respondent.*

[1] **Criminal Law—Trial—Time of Trial—Speedy Trial Rule—Purpose.** CrR 3.3, the speedy trial rule, protects the public's interest in the prompt administration of justice as well as the accused's right to a speedy trial.

[2] **Criminal Law—Jury—Right to Trial by Jury—Bias.** A criminal defendant's right to a jury trial necessitates that the jury be unbiased and unprejudiced.

[3] **Open Government—Constitutional Law—Freedom of Press—Prior Restraint—Restricted Access to Judicial Proceeding.** A limitation upon the news media's access to judicial proceedings which does not prohibit the publication or other communication of courtroom events does not constitute a prior restraint upon the exercise of free speech.

[4] **Constitutional Law—Freedom of Press—Bench-Bar-Press Guidelines—Purpose.** The Bench-Bar-Press Guidelines are intended to ensure the news media's responsible exercise of its constitutional freedoms while simultaneously protecting the constitutional rights of the parties to the action.

[5] **Criminal Law—Open Government—Constitutional Law—Freedom of Press—Pretrial Hearing—Access of News Media—Bench-Bar-Press Guidelines.** A trial court has the power to impose reasonable restrictions upon news media attendance at a pretrial hearing in a criminal case, including conditioning attendance upon the willingness to sign an agreement to abide by the Bench-Bar-Press Guidelines.

DOLLIVER, J., BRACHTENBACH, C.J., and UTTER and DIMMICK, JJ., dissent by separate opinion.

Nature of Action: A newspaper publisher brought an original action to prohibit a superior court from conditioning

news media attendance at pretrial hearings in an attempted murder prosecution upon the reporters' willingness to sign a written agreement to abide by the Bench-Bar-Press Guidelines.

Supreme Court: Holding that the condition upon attendance did not constitute a prior restraint and was reasonable, the court *denies* the relief sought.

McCush, Kingsbury, O'Connor, Ludwigson, Thompson & Hayes, by *John S. Ludwigson,* for petitioner.

Kenneth O. Eikenberry, Attorney General, and *Kevin M. Ryan, Assistant,* for respondent.

ROSELLINI, J.—This case is before the court as a result of a ruling by the Honorable Byron L. Swedberg in the case of State v. Compton, Whatcom County cause No. 80-1-00322-7, whereby he refused to grant a defense motion to close a suppression and CrR 3.5 hearing to the public, but conditioned media attendance upon the signing of an agreement to abide by the Bench-Bar-Press Guidelines.

The defendant in the Compton case had been charged with attempted murder. She was reputed to be the girlfriend of Kenneth Bianchi, known as the "Hillside Strangler". Bianchi's crimes were the subject of extensive news coverage locally, regionally and even nationally. The defendant Compton's alleged crime also received considerable attention by the media, although it did not reach the dimensions of the coverage given the Bianchi case. The defendant's motions were based upon the substantial likelihood that prospective jurors would read or watch publicity about the evidence discussed at the hearing and would form improperly based opinions as to the defendant's guilt.

A representative of the petitioner, publisher of the Bellingham Herald, objected to the motions to close the hearing and seal certain evidence, as did other representatives of the media who were present.

The court heard argument and determined that publication of detailed reports of the suppression and CrR 3.5 hearings would prejudice the defendant's right to a fair trial and that other alternatives to closure would be ineffective. While he

denied the motion to close the hearing, the judge, after questioning the media representatives as to whether they were familiar with the Bench-Bar-Press Guidelines and were willing to abide by them, imposed as a condition to media attendance the signing of an agreement to abide by the guidelines. Some representatives accepted this condition, signed the form of agreement provided by the prosecutor, and attended the hearing. The petitioner, through its agent, refused to sign and also refused to agree that its reporters would attend the hearing as members of the public and not in their professional capacity. Pursuant to the court's ruling, representatives of the petitioner and others who refused to sign left the court.

The petitioner inaugurated this proceeding to determine the propriety of the order insofar as it excluded media representatives unwilling to sign a commitment to abide by the Bench-Bar-Press Guidelines.

The Compton case was tried in March, and we realize that our opinion here will have no effect on those proceedings. [1] However, since it appears that the question is one which is likely to arise again and which will continue to evade review, we have taken cognizance of the petition.

In ruling on the closure motion, the trial court had in mind this court's opinion in *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980), where we held that Const. art. 1, § 10 bestows upon the public (including the media) a right of access to certain judicial proceedings, including the pretrial hearing. [2] That right, we said, must be balanced against the

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[1] In spite of the innovative precautions taken by the trial judge, he found it necessary to impanel a jury from Pierce County to ameliorate the effects of pretrial publicity.

[2] The United States Supreme Court had previously held, in *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979), construing the Sixth Amendment, that preliminary hearings may be closed to the public and the media in order to protect the defendant's right to a fair trial under the United States Constitution. It has since held, in a plurality and concurring opinions in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980), that the public and the press have a First and Fourteenth Amendment right to attend criminal *trials*, absent an overriding interest, articulated in findings.

right of a person accused of a crime to be tried by an impartial jury free from outside influence. When the accused makes a showing that there is a likelihood of prejudice to his constitutional rights if the hearing is open to the public, and the objectors, if any, propose no acceptable and practical alternative to closure, the court may order closure, after giving due consideration to the interests of the accused and the public. The order "must be no broader in its application or duration than necessary to serve its purpose". 94 Wn.2d at 64.

Certain alternatives to closure had been proposed by the petitioner in that case, which is the same publisher that is petitioning here. Suggested were continuance, severance, change of venue, change of venire, voir dire, peremptory challenges, sequestration of the jury and admonitions to the jury. Those alternatives all involved some compromise of a right or interest of the accused or the State. None of the suggested alternatives involved the exercise of some restraint on the part of the media.

[1] A continuance, if it is to be effective to allay the prejudice engendered by prejudicial publicity, will almost invariably delay the trial far beyond the time contemplated by CrR 3.3, which is designed to protect not only the right of the accused to a speedy trial but the interest of the public in seeing that the administration of justice is expedited. It also compromises the constitutional right of the accused to have a speedy trial (Const. art. 1 § 22). It is noteworthy that the constitutional provision which declares that justice shall be administered openly also prescribes that it shall be done without unnecessary delay (Const. art. 1, § 10).

Severance is an available alternative only when the prejudicial publicity affects a codefendant. It may operate to the disadvantage of the prosecution in presenting its case.

A change of venue requires the accused to give up the right to be tried by a jury of the county where the offense was committed (Const. art. 1, § 22; U.S. Const. amend. 6). A change of venue entails inconvenience of witnesses, counsel and the court itself, as well as members of the community who may wish to attend the trial. It is obviously for the benefit of the

latter, as well as that of the defendant, that the constitutional requirement of openly administered justice was intended.

[2] The right to trial by jury includes the right to an unbiased and unprejudiced jury. *State v. Stiltner,* 80 Wn.2d 47, 491 P.2d 1043 (1971). It is unlikely that a mere change of venire will produce a jury unexposed to the prejudicial publicity if it has been circulated throughout the county, as is the case here.

It is conceivable that by intensive voir dire, all prejudiced jurors may be eliminated. However, trial judges are aware that veniremen are loath to admit prejudice, or perhaps unable to recognize it, and intensive voir dire is apt to put the juror on the defensive and engender resentment toward the client of the attorney who pursues it. It is also unfair that an accused should be forced to use all or most of his peremptory challenges to rid the jury of persons who have read or heard of the prejudicial publications.

Sequestration is not a viable alternative if the hearings are held before the trial jury has been impaneled, and one objective of the hearings, to enable the parties to learn whether the evidence will be admitted and to prepare their cases accordingly, will be defeated if the hearing is not far enough in advance of the trial to allow for such preparation. In addition, under CrR 4.5, providing for the omnibus hearing, there are other matters which need to be resolved prior to the trial, such as the question whether there should be a pretrial conference.

Finally, jury admonitions may tend to focus the attention of the jurors upon the objectionable material, rather than to cleanse their minds of its effects.

The trial judge undoubtedly had these considerations in mind when he found that publicity with respect to the evidence considered at the suppression hearing would prejudice the defendant's right to a fair trial and that there was no feasible alternative to complete closure, other than partial closure. No error has been assigned to those findings, the only contention of the petitioner being that it was beyond the power of the court to exclude from the courtroom those members of the media,

appearing in their professional capacity, who refused to sign an agreement to abide by the Bench-Bar-Press Guidelines.

The theory of the petitioner is that the requirement imposed by the lower court constituted a prior restraint of the kind which was found unconstitutional in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976).

In that case, a state district judge had entered an order restraining members of the Nebraska Press Association from publishing or broadcasting accounts of confessions or admissions made by the accused or facts "strongly implicative" of the accused in a widely reported murder of six persons. The court held that an order of that kind—one which prohibited the publication or broadcast of particular information or commentary—was a "previous" or "prior" restraint on speech and came before the court with a " 'heavy presumption against [its] constitutional validity' ", as a consequence of which there was imposed upon the lower court a heavy burden of showing justification for the restraint. *Nebraska Press Ass'n*, at 545. The test to be applied, the court said, was that which was articulated by Judge Learned Hand in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 95 L. Ed. 1137, 71 S. Ct. 857 (1951). The question is whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

[3] We need not decide whether the circumstances of this case meet that test, as we are convinced that the order of the court did not involve a prior restraint upon the exercise of free speech.[3] There was no prohibition of publication or other communication of events which transpired in the courtroom.

The Supreme Court has recently held, in *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979), that in order to safeguard the due process rights of the

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[3] For the same reason, the case of *State ex rel. Superior Court v. Sperry*, 79 Wn.2d 69, 483 P.2d 608 (1971), is inapposite. There a court's order prohibited publication of evidence produced at trial, and this court held that the order was invalid, because it was broader than was necessary to accomplish its purpose of securing a fair trial for the defendant.

accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity, and he may take protective measures even when they are not strictly and inescapably necessary. A majority of the court, speaking through Mr. Justice Stewart, said:

> Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury. Cf. *Jackson v. Denno*, 378 U. S. 368. Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.

DePasquale, at 378.

Because of the difficulty in determining the actual effects of such publicity on the fairness of the trial, the majority said that closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun.

It was there contended that the public, including the press, had a right under the Sixth Amendment, which provides for an open trial, to attend the hearing. That right, the opinion said, was a right of the defendant alone, and nowhere in the constitution or in the common law could there be found a right on the part of the public to attend a pretrial hearing.

While this court has found a right of the public to attend a pretrial hearing, under the language of Const. art. 1, § 10, that right is qualified by the court's right and duty to see that the defendant has a fair trial. The court may order closure, if the objectors fail to demonstrate the availability of some practical alternative.

Here the court found that the only alternatives which could conceivably be effective in protecting the defendant's rights were to either close the hearing or exact a commitment from the members of the media to abide by the Bench-Bar-Press Guidelines.

The Bench-Bar-Press Guidelines, insofar as they are relevant here, are set forth in the appendix to this opinion. They are, by definition, not a set of rules but rather principles which guide the courts, lawyers and court personnel, as well as the media, in protecting the rights of an accused and other litigants to a fair trial, while at the same time respecting and preserving the freedoms of speech and press guaranteed by the state and federal constitutions. Under their express provisions, they honor the right of the news media to report what occurs in the course of the judicial proceeding.

[4] As was pointed out by Justice Finley in his concurring opinion in *State ex rel. Superior Court v. Sperry*, 79 Wn.2d 69, 483 P.2d 608 (1971), responsible exercise of constitutional freedoms, with regard for the constitutional rights of accused persons and other litigants, is the essence of the guidelines.

It is true that these guidelines suggest the exercise of caution in reporting matters which may be damaging to the right of an accused to a fair trial, at a time when that risk is greatest—that is, prior to the trial. Ordinarily, members of the media who have declared their adherence to the guidelines do exercise restraint in such reporting, but it had been the experience of the trial judge here that mere oral commitment had not sufficed to produce that restraint. He recognized that by admitting members of the press to such a sensitive proceeding, even upon their written agreement to be guided by these standards, he was placing the defendant's interests in some jeopardy. Yet he was willing to try this method of securing compliance, as an experiment, to see if it would be effective in protecting the defendant while at the same time allowing the public, including the media, to attend the hearing. As we view this measure, it was a good faith attempt to accommodate the interests of both defendant and press which, hopefully, would prove both practical and effective as an alternative to closure.

The petitioner's objection to the ruling is grounded upon its fear that, should it publish reports of the hearing, it would be subject to contempt proceedings. Whether the contempt power of the court could in other circumstances properly extend to punishment for alleged violation of an agreement to adhere to a set of standards as nonobligatory as these is a question which has not been briefed and which we need not decide. It would, however, be contrary to the spirit and intent of the Bench-Bar-Press Guidelines to invoke such a remedy for their alleged violation, and the comments of the lower court in making its ruling indicate that the court was in agreement with that principle. It issued no orders prohibiting publication, nor did it threaten any sanctions if a person signing an agreement to abide by the guidelines should thereafter ignore them. Its ruling was simply that any media member not willing to put his moral commitment in writing would be excluded from the hearing.

[5] Inasmuch as the court had the authority, under our holding in *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980), to exclude all of the public, including the media, it had also the included power to impose reasonable conditions upon attendance. The exaction of an agreement to abide by standards which have gained the approval of all of the media of mass communications in this state was not unreasonable, particularly in view of the fact that the commitment is a moral one, even when expressed in writing, and not enforceable in a court of law.

The procedure may not prove effective, and it may be that in cases of this kind the rights of the defendant can be secured only by closing the suppression and CrR 3.5 hearings; but it would be a disservice to the public, as well as the media, to declare that a lesser measure, as innocuous as that employed here, is beyond the reach of a court attempting in good faith to accommodate the rights of all concerned.

That reasonable limitations may be imposed upon attendance at a judicial proceeding was recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973,

100 S. Ct. 2814 (1980) (Mr. Justice White, concurring). In a footnote at page 581, he said:

> Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, see, *e. g., Cox v. New Hampshire,* 312 U.S. 569 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

Our conclusion is that the limitation imposed here was a reasonable one, and the petition is accordingly denied.

STAFFORD, HICKS, WILLIAMS, and DORE, JJ., concur.

APPENDIX

BENCH-BAR-PRESS PRINCIPLES AND GUIDELINES 1974

PREAMBLE

The Bench, Bar and Press (comprising all media of mass communications) of Washington:

(a) Recognize that freedom of news media is one of the fundamental liberties guaranteed by the First Amendment of the Constitution of the United States and that this basic freedom must be zealously preserved and responsibility exercised.

(b) Are obliged to preserve the principle of the presumption of innocence for those accused of a crime until there has been a finding of guilt in an appropriate court of justice.

(c) Believe members of an organized society have the right to acquire and impart information about their mutual interests. The right to disseminate information should be exercised with discretion when public disclosures might jeopardize the ends of justice.

(d) Have the responsibility to support the free flow of information, consistent with the principles of the Constitution and this Preamble.

To promote a better understanding between the Bench and Bar of Washington and the Washington News Media, particularly in their efforts to reconcile the constitutional guarantee of freedom of the press and the right to a fair, impartial trial, the following statement of principles mutually drawn and submitted for voluntary compliance, is recommended to all members of these professions in Washington.

PRINCIPLES

1. The News Media have the right and responsibility to print the truth. A free and responsible news media enhances the administration of justice. Members of the Bench and Bar should, within their respective codes of conduct and professional responsibility, cooperate with the news media in the reporting of the administration of justice.

2. Parties to litigation have the right to have their causes tried fairly by an impartial tribunal. Defendants in criminal cases are guaranteed this right by the Constitutions of the United States and the various states.

3. No trial should be influenced by the pressure of publicity from news media nor from public clamor, and lawyers and journalists share the responsibility to prevent the creation of such pressures.

4. All news media should strive for objectivity and accuracy. The public has a right to be informed. The accused has a right to be judged in an atmosphere free from undue prejudice.

5. The news media recognizes the responsibility of the judge to preserve order in the court and to seek the ends of justice by all those means available to him.

6. Decisions about handling the news rest with editors, but in the exercise of news judgments the editor should remember that:

(a) An accused person is presumed innocent until proven guilty.

(b) Readers and listeners and viewers are potential jurors.

(c) No person's reputation should be injured needlessly.

7. The public is entitled to know how justice is being administered. However, no lawyer should exploit any medium of public information to enhance his side of a pending case. It follows that the public prosecutor should avoid taking unfair

advantage of his position as an important source of news; this shall not be construed to limit his obligation to make available information to which the public is entitled.

8. Proper journalistic and legal training should include instruction in the meaning of constitutional rights to a fair trial, freedom of press, and the role of both journalist and lawyer in guarding these rights.

Guidelines for the Reporting of Criminal Proceedings

The proper administration of justice is the responsibility of the judiciary, bar, the prosecution, law enforcement personnel, news media and the public. None should relinquish its share in that responsibility or attempt to override or regulate the judgment of the other. None should condone injustices on the ground that they are infrequent.

The greatest news interest is usually engendered during the pretrial stage of a criminal case. It is then that the maximum attention is received and the greatest impact is made upon the public mind. It is then that the greatest danger to a fair trial occurs. The bench, the bar and the news media must exercise good judgment to balance the possible release of prejudicial information with the real public interest. However, these considerations are not necessarily applicable once a jury has been empaneled in a case. It is inherent in the concept of freedom of the press that the news media be free to report what occurs in public proceedings, such as criminal trials. In the course of the trial it is the responsibility of the bench to take appropriate measures to insure that the deliberations of the jury are based upon what is presented to them in court.

These guidelines are proposed as a means of balancing the public's right to be informed with the accused's right to a fair trial before an impartial jury.

1. It is appropriate to make public the following information concerning the defendant:

(a) The defendant's name, age, residence, employment, marital status, and similar background information,

there should be no restraint on biographical facts other than accuracy, good taste and judgment.

(b) The substance or text of the charge, such as complaint, indictment, information or, where appropriate, the identity of the complaining party.

(c) The identity of the investigating and arresting agency and the length of the investigation.

(d) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of items seized at the time of arrest.

2. The release of certain types of information by law enforcement personnel, the bench and bar and the publication thereof by news media generally tends to create dangers of prejudice without serving a significant law enforcement or public interest function. Therefore, all concerned should be aware of the dangers of prejudice in making pretrial public disclosures of the following:

(a) Opinions about a defendant's character. his guilt or innocence.

(b) Admissions, confessions or the contents of a statement or alibis attributable to a defendant.

(c) References to the results of investigative procedures, such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests.

(d) Statements concerning the credibility or anticipated testimony of prospective witnesses.

(e) Opinions concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

Exceptions may be in order if information to the public is essential to the apprehension of a suspect, or where other public interests will be served.

3. Prior criminal charges and convictions are matters of public record and are available to the news media through police agencies or court clerks. Law enforcement agencies should make such information available to the news media after a legitimate inquiry. The public disclosure of this information by the news media may be highly prejudicial without any significant addition to the public's need to be informed. The publication of such information should be carefully reviewed.

4. Law enforcement and court personnel should not prevent the photographing of defendants when they are in public places outside the courtroom. They should not encourage pictures or televising nor should they pose the defendant.

5. Photographs of a suspect may be released by law enforcement personnel provided a valid law enforcement function is served thereby. It is proper to disclose such information as may be necessary to enlist public assistance in apprehending fugitives from justice. Such disclosure may include photographs as well as records of prior arrests and convictions.

6. The news media are free to report what occurs in the course of the judicial proceeding itself. The bench should utilize available measures, such as cautionary instructions, sequestration of the jury and the holding of hearings on evidence after the empaneling of the jury, to insure that the jury's deliberations are based upon evidence presented to them in court.

7. Is is improper for members of the bench-bar-news media or law enforcement agencies to make available to the public any statement or information for the purpose of influencing the outcome of a criminal trial.

8. Sensationalism should be avoided by all persons and agencies connected with the trial or reporting of a criminal case.

DOLLIVER, J. (dissenting)—The document Judge Swedberg required a member of the press to sign before being admitted to the courtroom is as follows:

BENCH-BAR-PRESS
GUIDELINES FORM

This form is for the use of all media representatives planning to attend the hearing in State v. Veronica Lynn Compton, Whatcom County Cause No. 80-1-00322-7, to be held at 1:30 p.m. in Department No. 2 of the Whatcom County Superior Court on the 19th day of December, 1980.

1. I have read the Bench-Bar-Press Guidelines of 1974, which are attached to this form.

2. If I have not yet read the Bench-Bar-Press Guidelines that are attached to this form, I shall do so before I report in any manner on the hearing of the above-mentioned matter.

3. I agree to follow the Bench-Bar-Press Guidelines of 1974 in any reporting of the proceedings in the above-captioned matter at the hearing scheduled on the 19th day of December, 1980, in Department No. 2 of the Whatcom County Superior Court at 1:30 p.m.

4. As a representative of _____, I am authorized to bind my news agency to follow the Bench-Bar-Press Guidelines.

DATED THIS day of December, 1980.

_____
(Signature)

In *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980), the court held that under certain circumstances the public could be excluded from a pretrial suppression hearing. The majority here indicates that if the court has the authority to exclude, it certainly has "the included power to impose reasonable conditions upon attendance." Majority opinion, at 22. Even if this is so—which I do not concede—it is not

a "reasonable condition" for admittance to a courtroom for a judge to limit what a newspaper may print or a radio or television station may broadcast. *See State ex rel. Superior Court v. Sperry*, 79 Wn.2d 69, 483 P.2d 608 (1971). This action by the court compelling certain action by the press before it is allowed to exercise its First Amendment rights is prior restraint. *See State v. Allen*, 73 N.J. 132, 373 A.2d 377 (1977); *Keene Publishing Corp. v. Cheshire County Superior Court*, 119 N.H. 710, 406 A.2d 137 (1979). Before prior restraint can be invoked by a court, there is, as the majority correctly notes, a heavy burden on the trial court of showing justification for the restraint. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976).

Whether this case is characterized as a *Federated Publications, Inc. v. Kurtz* case as does the majority, or a prior restraint case, as I believe is correct, the burden for closure of the courtroom or prior restraint was not met by the trial judge. There is no question but that the Compton case generated considerable local interest and received and would continue to receive substantial news coverage. However, there is nothing in the record, nor an allegation or showing to the trial judge, that any of the news coverage of the case had been or was likely to become sensational in nature or that anything had been published in violation of the Bench-Bar-Press Guidelines.

Even the majority seems to be aware that there is no factual basis for the trial judge's ruling:

> The trial judge undoubtedly had these considerations in mind [those considerations spelled out by the majority, but not by the trial judge] when he found that publicity with respect to the evidence considered at the suppression hearing would prejudice the defendant's right to a fair trial and that there was no feasible alternative to complete closure, other than partial closure.

Assuming this is a closure case, what are the standards which must be met by the trial court? The guidelines are set out

in *Federated Publications, Inc. v. Kurtz, supra* at 62-65. Guideline 4 is particularly in point:

> The court must weigh the competing interests of the defendant and the public. In the present case, the court, in granting the closure motion, entered findings which detailed the prejudicial nature of the evidence sought to be suppressed, by prior publication of damaging ballistics evidence (which resulted in the change of venue), and the fact of Herald circulation in Skagit County. In their arguments in support of the closure motion, both the prosecuting attorney and defense counsel emphasized to the court their recognition of the need for public dissemination of information along with their fear that an impartial jury could not be found if the suppression hearing testimony were published. In our view, the trial judge gave due consideration to both sides before he made his ruling.

Federated Publications, at 64.

A review of the record in *Federated Publications* shows there were extensive and detailed findings of fact, plus attached exhibits which enabled the trial court to engage in the required "weigh[ing of] the competing interests of the defendant and the public." *Federated Publications,* at 66.

In the case before us, there was the following: (1) In its oral opinion, the trial court made the conclusory statements that

> the likelihood of jeopardy to a fair trial is overwhelmingly established . . . [T]he usual methods to protect a fair trial such as voir dire, peremptory challenges and others is not an adequate safeguard.

(2) The only other relevant document is the "Order on Omnibus Motions" which reads in its entirety:

> THIS MATTER having come on regularly before the above-entitled Court on the 19th day of December, 1980, and the defendant, VERONICA LYNN COMPTON, being personally present, and represented by

her attorney, WILLIAM JOHNSTON, and the State of Washington being represented by DAVID S. MCEACHRAN, Prosecuting Attorney in and for Whatcom County, State of Washington, and the Court having heard argument of counsel, and being fully advised in the premises, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's motion to continue the trial in the above-captioned matter shall be and is hereby granted, and the trial shall be set for March 9 through March 20, 1981, in Department No. 2 of the above-entitled Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant's motion to obtain certified copies of a search warrant, affidavit, and return shall be and is hereby granted.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the laws of the State of Washington shall apply to the search and seizure of items in the defendant's residence in the State of California, and also to any statements the defendant made to police officers in the State of California.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's motion to reduce the bail set in this matter shall be and is hereby denied.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's motion for closure of the pretrial hearing relating to statements made by defendant and testimony argument relating to the motion to suppress shall be and is hereby denied, pursuant to the following restrictions:

1. Representatives of the news media shall be allowed to attend this hearing if they sign a form indicating that they have read and understand the Bench-Bar-Press Guidelines of 1974, and will follow those guidelines in reporting on the hearing in this case.

> 2. Those representatives of the news media who will not agree to signing such a form shall not be permitted to attend this hearing.

These statements and order by the trial court do not even come close to meeting our requirements in *Federated Publications, Inc. v. Kurtz, supra,* for the closure of a courtroom in a suppression hearing. Much less do they meet the standards of the United States Supreme Court for prior restraint as articulated in the *Nebraska Press Ass'n* case. *See Keene Publishing Corp. v. Cheshire County Superior Court, supra.* This court should not allow the great freedoms of the First Amendment and Const. art. 1, § 10 to be traduced in this manner.

While I believe on the merits the plaintiff should prevail, my preference for disposition of this case would be to declare the entire matter moot. As is pointed out by the majority, the trial in question has been held so what we say here will be meaningless in that context. As to the contention that this is a dispute "capable of repetition, yet evading review" (*see Nebraska Press Ass'n v. Stuart, supra* at 546), I doubt that this is so. Rather, I prefer to believe that an atmosphere of mutual regard for the right of access to courtrooms, the right of free speech and the rights of defendant may have developed in Whatcom County, and that we would better serve that county and its citizens, as well as those in other counties, by refusing to decide a case that need not be decided.

I dissent.

BRACHTENBACH, C.J., and UTTER and DIMMICK, JJ., concur with DOLLIVER, J.

THE SUPREME COURT OF WASHINGTON

No. 47453-2

FEDERATED PUBLICATIONS, INC.,
Petitioner,

v.

BYRON L. SWEDBERG, as Judge
of the Superior Court for Whatcom County,
Respondent.

ORDER

Denying Motion for Reconsideration

The Court having decided by majority vote that the petitioner's motion for reconsideration should be denied.

It is ordered that the motion be and it hereby is denied.

Dated this 24th day of December, 1981.

ROBERT F. BRACHTENBACH
Chief Justice

Listing of Parents, Subsidiaries and Affiliates in compliance with Rule 28.1 of the Supreme Court

Name of Corporation	State of Incorporation
ADS Holdings Inc.	Delaware
Applied Display Services, Inc.	Delaware
Binghamton Press Company, Inc.	New York
California Newspapers, Inc.	California
Cape Publications, Inc.	Florida
Chillicothe Newspapers Inc.	Ohio
The Cincinnati Enquirer, Inc.	Ohio
Citizen Publishing Company	Arizona
The Coffeyville Publishing Company, Inc.	Kansas
Combined Communications Corporation	Arizona
Combined Communications Corporation of Kentucky, Inc.	Arizona
Combined Communications Corporation of Oklahoma, Inc.	Oklahoma
Courier-News Co.	New Jersey
Daily News Publishing Co., Inc.	Virgin Islands
El Paso Times, Inc.	Delaware
Eleven-Fifty Corporation	Delaware
Eller Electric Sign Co.	Arizona
Elmira Star-Gazette, Inc.	New York
Empire Nevada, Inc.	Nevada
Equitable Publishing Company	Pennsylvania
Fairpress, Inc.	Delaware
Federated Publications, Inc.	Delaware
Fort Collins Newspapers Inc.	Colorado
The Fremont Messenger Company	Ohio
Fremont Newspapers Inc.	Nebraska
Gannett Co., Inc.	Delaware
Gannett Community Television, Inc.	Delaware
Gannett Edmonton Corp.	New York

Name of Corporation	State of Incorporation
Gannett El Diario Subsidiary, Inc.	New York
Gannett Florida Broadcasting, Inc.	New York
Gannett Florida Corporation	Florida
Gannett Lansdale Subsidiary, Inc.	Pennsylvania
Gannett Nevada Supply Corporation	Nevada
Gannett News Service, Inc.	Delaware
Gannett Newspaper Advertising Sales, Inc.	Delaware
Gannett Norwich Subsidiary, Inc.	Connecticut
Gannett Outdoor Co. of Arizona	Arizona
Gannett Outdoor Co. of Connecticut	Arizona
Gannett Outdoor Co. of Kansas City	Minnesota
Gannett Outdoor Co. of Michigan	Arizona
Gannett Outdoor Co., Inc. of New Jersey	New Jersey
Gannett Outdoor Co., Inc. of Northern California	Delaware
Gannett Outdoor Co., Inc. of Southern California	Arizona
Gannett Outdoor Co. of Texas	Texas
Gannett Outdoor Sales Co., Inc.	Delaware
Gannett Pacific Corporation	Delaware
Gannett Reno Supply Corporation	Nevada
Gannett Sampler Subsidiary, Inc.	New Jersey
Gannett Satellite Information Network, Inc.	Delaware
Gannett Supply Corporation	Delaware
Gateway Productions, Inc.	New York
Globe Broadcasting Co.	Delaware
Green Bay Newspapers Company	Wisconsin
Green Bay Publishing Co., Inc.	Wisconsin
Guam Publications, Incorporated	Hawaii
Hawaii Newspaper Agency, Inc.	Hawaii
Louis Harris and Associates, Inc.	Delaware
Louis Harris International, Inc.	Delaware
Huntington Publishing Company	West Virginia

Name of Corporation	State of Incorporation
Ithaca Journal-News, Inc.	New York
Knoxville Journal Corporation	Tennessee
KPNX Broadcasting Company	Arizona
Laser Graphic Systems Corporation	Delaware
McClure Newspapers, Inc.	Delaware
Mediacom, Inc.	Canada
Mediacom Industries, Inc.	Canada
Ministage, Inc.	New York
National Research Center of The Arts, Inc.	Delaware
The New Mexican, Inc.	New Mexico
New Tennessean, Inc.	Tennessee
News-Press Publishing Company	Florida
News Printing Company	Pennsylvania
Newspaper Printing Corporation	Tennessee
Newspaper Printing Corporation	Texas
Newspaper Production Company	Louisiana
Newspaper Realty Company	Texas
Niagara Falls Gazette Publishing Corporation	New York
Northwestern Publishing Company	Illinois
Oakland Tribune, Inc.	Arizona
Oklahoma Press Publishing Company	Oklahoma
PIA Merchandising Co.	California
Pacific Media Inc.	Delaware
Pacific and Southern Company, Inc.	Delaware
Palladium Publishing Corporation	Indiana
Pensacola News-Journal Inc.	Florida
Political Analysis, Inc.	Delaware
Poughkeepsie Newspapers Inc.	New York
Press-Citizen Company Inc.	Iowa
Record-Herald, Inc.	Wisconsin
Reno Newspapers, Inc.	Nevada
Rockford Newspapers, Inc.	Delaware

Name of Corporation	State of Incorporation
Romo, Inc.	Wisconsin
Salem County Sampler, Inc.	New Jersey
Salinas Newspapers Inc.	California
The Saratogian, Inc.	New York
Seminole Citizen News, Inc.	Florida
Sioux Falls Newspapers Inc.	South Dakota
Southern New Jersey Newspapers Inc.	New Jersey
Southland Publishing Company	Georgia
Speidel Newspapers Inc.	Delaware
Springair, Inc.	New Hampshire
Springfield Newspapers, Incorporated	Missouri
St. Cloud Newspapers Inc.	Minnesota
The Statesman-Journal Company	Oregon
Stockton Newspapers Inc.	California
The Sturgis Journal, Inc.	Michigan
The Suburban Newspaper Group	New Jersey
The Sun Company of San Bernardino, California	California
Tennessean Newspapers, Inc.	Tennessee
Tennessee Continental Corporation	Tennessee
The Times Company	Ohio
The Times-Herald Company	Michigan
The Times Publishing Company, Limited	Louisiana
Trucking, Incorporated	Delaware
Tucson Newspapers, Inc.	Arizona
United Advertising Corporation	New Jersey
Utica Observer-Dispatch, Inc.	New York
Valley of The Sun, Inc.	Arizona
Visalia Newspapers Inc.	California
Westchester Rockland Newspapers, Inc.	New York
WPTA-TV, Inc.	Arizona

Opposition

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NO. 81-1769

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

Federated Publications, Inc.,

Petitioner,

v.

Honorable Byron L. Swedberg,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 81-1769

Federated Publications, Inc.,

Petitioner,

v.

Honorable Byron L. Swedberg,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. As an alternative to full closure of a pretrial criminal proceeding, may the trial judge constitutionally require a media member before entering the courtroom to sign an agreement to follow Bench-Bar-Press Guidelines in reporting on the subject

matter of the hearing they attend?

2. May a trial judge condition admission to a pretrial criminal proceeding on a promise by a media member to observe state Bench-Bar-Press Guidelines?

3. Is a court imposed requirement that the press agree to follow these guidelines in reporting on a pretrial criminal hearing a "reasonable limitation on access" to a pretrial criminal proceeding?

4. May a trial judge, consistent with the First and Fourteenth Amendments, conditionally admit members of the press to a pretrial criminal proceeding while allowing members of the public to attend without condition.

STATEMENT OF THE CASE

The respondent, Judge Swedberg,

fundamentally agrees with the petitioner's statement of the case with the exception of its statement on page 4 of the petition that the Bench-Bar-Press Guidelines form was prepared by the trial judge. In fact, the form was prepared by the county prosecutor at the request of the judge.

In addition to the statement offered by the petitioner, Judge Swedberg would add the following:

At the time the matter in issue came before the trial court, there had already been considerable media interest manifested in the proceedings and the court determined that a detailed publication of the matters to be elicited during the hearing would have created a substantial danger to the defendant's right to a fair trial.

Other methods of protecting this right, less than severe than closure, had been examined by the court and found wanting. In addition, Federated Publications, Inc., doing business as the Bellingham Herald, which was represented by an attorney before the court on the question of closure, was a newspaper well known to the bench of Whatcom County, Washington. The newspaper had recently been involved in reporting a notorious murder case in the County and, in the process, in the view of the presiding judge in that case, had repeatedly violated the Bench-Bar-Press Guidelines. Federated Publications, Inc. v. Kurtz, 615 P.2d 440, 446-47, 94 Wn.2d 51, 63 (1980).

REASONS FOR DENYING WRIT

I. This Matter is not Appropriate

for Certiorari Review by this Court.

A. The Facts of the Case and the Action of the Trial Judge are Peculiar to this Case.

In analyzing the action of the trial court, the Supreme Court of Washington recognized that Judge Swedberg was wrestling with the need to protect the accused's fair trial right and the requirement of the Washington State Constitution, Article I, § 10 to generally permit the public to attend judicial proceedings. Federated Publications, Inc. v. Swedberg, 96 Wn.2d 13, 20, 633 P.2d 74, 77 (1981) (Petition for Cert., p. A-7). Given this judicial prejudice against closure of court proceedings, Judge Swedberg might well have denied both the defense and prosecution motion for closure but for his previous experience with oral

commitments from the media. As the State Supreme Court recognized:

> ". . . Ordinarily, members of the media who have declared their adherence to the guidelines do exercise restraint in such reporting, but it had been the experience of the trial judge here that mere oral commitment had not sufficed to produce that restraint. He recognized that by admitting members of the press to such a sensitive proceeding, even upon their written agreement to be guided by these standards, he was placing the defendant's interest in some jeopardy. Yet he was willing to try this method of securing compliance, as an experiment, to see if it would be effective in protecting the defendant while at the same time allowing the public, including the media, to attend the hearing. . . ." Federated Publications, Inc. v. Swedberg, 633 P.2d at 78 (Petition for Cert., p. A-8).

This is a salient consideration which the State Supreme Court relied

upon in part in sustaining the trial judge's actions. Thus, it would seem that the unique circumstances confronting the trial judge in this case, given the experience of the Whatcom County bench with the Bellingham Herald resulting in a State Supreme Court decision and the State Constitutional provisions guaranteeing open court proceedings, would be unlikely to reoccur on any predictable basis in the future.

B. The Decision of the Court Below is Consistent with Federal Law and is not in Conflict with any Prior Decisions of this Court or a Federal Court of Appeals.

In reaching its decision, the court below analyzed the matter substantially as follows. The question of media coverage arose in connection with the pretrial criminal hearing.

The need to exercise caution in reporting matters which may be damaging to the accused's right to fair trial is most accute during that pretrial period. This tenet is fundamental to the Bench-Bar-Press Guidelines observed in this state. See Petition for Cert., pp. A-13 and A-14. Gannett Co. v. DePasquale, 443 U.S. 368, 61 L.Ed.2d 608, 99 S.Ct. 2898 (1979) recognizes the affirmative constitutional duty of the trial judge to minimize the effects of prejudicial pretrial publicity and his responsibility to take protective measures even when they are not strictly or inescapably necessary. Article I, § 10 of the Constitution of the State of Washington provides that:

"Justice in all cases shall

be administered openly, and without uneccessary delay."

This requirement must be tempered by the right of the accused to receive a fair trial by an impartial jury. Finally, the United States Supreme Court had not expressly ruled that the press has an absolute First Amendment right to attend all court proceedings regardless of the consequences to a defendant's fair trial right. The Washington Supreme Court had held that the State constitutional requirement for open proceedings was not absolute and would yield to the defendant's right to an impartial jury. Federated Publications, Inc. v. Kurtz, supra; cf., Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), Dore, J., concurring. Finally, in Richmond Newspapers, Inc. v. Virginia, 448

U.S. 555 (1980) the Supreme Court did recognize that reasonable limitations may be imposed upon the attendance at judicial proceedings.

Reasoning thus, the court below reached a decision that is fully consistent with existing federal and state law.

II. The Decision of the Trial Judge Requiring Members of the Media to Promise to Abide by Bench-Bar-Press Guidelines Prior to Attending the Pretrial Criminal Proceeding, did not Constitute a Prior Restraint on their First Amendment Freedoms.

Throughout the petition, Federated Publications, Inc. implicitly but persistently, characterized Judge Swedberg's order as a manifestation of legal tyranny by dictating to the press what it must or must not print. It, therefore, analogizes Judge Swedberg's ruling to the order condemned in

Nebraska Press Association v. Stuart, 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791 (1976). In that case, the state district court judge flatly prohibited members of the Nebraska Press Association from publishing or broadcasting any accounts of confessions or admissions made by the accused in the case or any other facts which strongly implicated the accused with the murder of six persons.

In this case, Judge Swedberg made no such order. The Washington Supreme Court found that:

> ". . . the order of the court did not involve a prior restraint upon the exercise of free speech. There was no prohibition of publication or other communication of events which transpired in the courtroom." Federated Publications, Inc. v. Swedberg, 633 P.2d at 77 (Petition for Cert., p. A-6).

This conclusion is dictated by the nature of the Guidelines themselves:

> "They are, by definition, not a set of rules but rather principles which guide the courts, lawyers and court personnel, as well as the media, in protecting the rights of an accused and other litigants to a fair trial, while at the same time respecting and preserving the freedoms of speech and press guaranteed by the state and federal constitutions. Under their express provisions, they honor the right of the news media to report what occurs in the course of a judicial proceeding." Federated Publications, Inc. v. Swedberg, at 77, (Petition for Cert., p. A-8).

Federated Publications, Inc. takes some pains to raise the specter of a potential contempt proceeding against itself or other similarly situated media groups should it breach its reporter's promise to follow the guidelines and print something that some court may think is inconsistent

with those guidelines. In truth, there would be no basis for such an apprehension, if indeed it existed. First, the trial which gave rise to the matter is long over and thus there could not be any possibility of contempt citations in this case now. Secondly, the State Supreme Court clearly indicated that contempt proceedings for a breach of any agreement of the type sought by Judge Swedberg would be totally inappropriate and could not be sustained.

> ". . . It would, however, be contrary to the spirit and intent of the Bench-Bar-Press Guidelines to invoke such a remedy for their alleged violation, and the comments of the lower court in making its ruling indicate that the court was in agreement with that principle. It issued no orders prohibiting publication, nor did it threaten any sanctions if a person signing an agreement

> to abide by the guidelines should thereafter ignore them. Its ruling was simply that any media member not willing to put his moral commitment in writing would be excluded from the hearing." Ibid., 633 P.2d at 77 (Petition for Cert., p. A-9).

The contrast between this case and Stuart is clear. There was an order in the Stuart case prohibiting certain publications and the order was made during the trial of the case. Here there was simply a ruling by the court that closure would be denied but that interested media would have to make an appropriate promise to observe Bench-Bar-Press Guidelines which are not rules, but principles, and which do not actually prohibit any publication. This court should note that we are here concerned with a critical stage in a criminal proceeding and that these

Guidelines are oriented primarily towards those pretrial proceedings. It is their primary purpose to encourage restraint particularly during the pretrial stage of a criminal case so that the public's right to be informed might properly be balanced with the accused's right to a fair trial before an impartial jury.

Petitioner sets up a parade of horrors if this court allows the decision below to ravage the First Amendment by suppressing the press and by submitting reporters to intimidation by inquisition. Petition for Cert., p. 11. If there is any clear consequence of the media ignoring the goals of the Guidelines, it is that of closure of the pretrial proceedings such as the closure which flowed from

the alleged practices of the petitioner in an earlier case in the same county. Federated Publications, Inc. v. Kurtz, supra.

Frankly, petitioner overstates the circumstances. To give flesh to its "prior restraint" argument, it suggests that it has been abused by an overbearing and tyrannical judge who has forbidden it under pain of uncertain punishment to publish as it chooses. (Petition for Cert., p 14). Yet it shows no concern that the total unfettered discretion it seeks may have had serious consequences for the deadly earnest business of a trial for attempted murder. The trial court could not have been so singleminded. The petitioner claims to have been unceremoniously excluded from these

legal proceedings, the attendance at and the publication of which is an unmutable right of its calling. (Petition for Cert., p. 15-16). Surely, its wounds would have been all the more severe had the court taken the only other alternative open to it in view of its findings, that of closure of the proceedings entirely.

After considering all of his alternatives, the trial judge found that publicity with respect to the evidence to be considered at the suppression hearing would prejudice the defendant's right to a fair trial and that there was no feasible alternative to complete closure. The petitioner assigns no error to those findings. Federated Publications, Inc. v. Swedberg, 633 P.2d at 76.

However, instead of taking the simple, but sure, course open to the court in the light of the decisions of the U.S. Supreme Court in Gannett and the State Supreme Court in Kurtz, the judge attempted a more discriminating course which placed his faith and the possible fate of the accused in the goodwill and responsibility of the media. Instead of this condemnation, the judge should be commended for his efforts to keep the hearing open.

III. The Trial Judge's Requirement for an Agreement from Media Members Attending the Pretrial Hearing was not an Unconstitutional Condition on the Exercise of a Constitutional Right.

The petitioner suggests that the Court has imposed a condition upon attendance at the [illegible] trial proceedings. The condition, it says, was that the media could not attend unless they

published what the Court wished. Petition for Cert., p. 14. This, it says, was to penalize members of the press who do not agree with the Court. Petition for Cert., p. 14. Surely, the petitioner can not be serious. This case has nothing in common with the likes of Speiser v. Randall, 357 U.S. 513 (1958) or Perry v. Sindermann, 408 U.S. 593 (1972). It is no consequence to the judge in any personal sense what the petitioner may or may not publish. However, it is the Court's clear constitutional duty to assure that the defendant in a criminal trial has a fair hearing before an impartial jury. A judge is dutybound to see that those constitutional guarantees are preserved to the defendant even it is means restrictions

on the media or the public. It is on that basis that closure was authorized in Gannett. Here, the trial judge was simply trying to fashion a remedy less severe than closure that would allow media attendance. The "condition" of the agreement could not have been enforced in any way. Therefore, had the media not responded to the opportunity, the Court would have had to take the more drastic measure of full closure of the proceedings.

This does not impose an unconstitutional condition on the exercise of a constitutional right. The "condition" was essentially an appeal to professional media ethics and was rationally connected to the preservation of another constitutional right.

IV. The Request by the Court for a Promise was Reasonable Under the Circumstances and did not Control the Content of Any Publications by the Media.

Petitioner has argued that the Constitution prohibits limitations on access to public places, to include courtrooms, except with respect to the time, place and manner of access. Petition for Cert., p. 16, et seq. That is, the restrictions that may be imposed on access cannot have any relationship to the content of the "speech" that might occur as a result of the access. That seems generally to be true in cases where there is no significant competing constitutional consideration. See Adderly v. Florida, 385 U.S. 39 (1966) and Police Department of Chicago v. Mosely, 409 U.S. 92 (1972). Again, the cases cited

by the petitioner in note 13, p. 18 of its Petition, Nebraska Press Association, supra; United States ex rel. Bruno v. Herald, 408 F.2d 125 (2nd Cir. 1969); and United States ex rel. Smallwood v. Lavalle, 377 F.Supp. 1148 (E.D.N.Y. 1974), all involved restrictions or closures to protect some interest other than that of the accused's right to a fair trial and they all involved trial proceedings as opposed to pretrial proceedings.

That is the telling distinction between those cases and the one at hand. If a trial court, under proper circumstances, cannot prohibit access to certain pretrial criminal proceedings, there will be situations in which an accused will not be able to effectively obtain a trial by an

impartial jury.

Petitioner complains that a court cannot control the content of publications. Closure of pretrial proceedings is the ultimate control over content and is permissible (Gannett v. DePasquale, supra) but closure is not a preferred alternative. Therefore, a trial judge should be encouraged to find a mechanism short of closure which still does not operate as a "prior restraint." That mechanism here at least was to be the conscience and responsibility of the media which attended the proceeding. The mechanisms may be somewhat different in another situation. Because the trial court could not totally ignore the possibility that the media might report material damaging to the defendant's

right to an impartial jury, some action seemed necessary. The court chose the less intrusive device of seeking a promise to observe the principles of the voluntary guidelines which do not actually prohibit publication or other communication of events in the courtroom. Petitioner argues that Judge Swedberg's ruling was a "content sensitive limitation on access" and can not be preferred to closure. Petition for Cert., pp. 20-21. Still they offer no alternatives. Since the petitioner chose not to challenge the findings of the trial court with the respect to the adequacy of other measures to protect the accused's right to an impartial jury, it is inappropriate for it to do so now in a petition for writ of certiorari.

V. The Conditional Admittance of the Media to the Proceedings was not a Denial of Equal Protection.

The State of Washington recognizes an equal right of the press and the public to access to court proceedings. Article I, § 10, Constitution of the State of Washington; Cohen v. Everett City Council, 85 Wn.2d 385, 535 P.2d 801 (1975). However this right of access is not absolute, particularly when restrictions need to be imposed to protect the defendant's right to a fair trial. Gannett v. DePasquale, supra, and Federated Publications, Inc. v. Kurtz, supra. It is true that the equal protection clause of the Fourteenth Amendment requires that all persons be treated substantially alike by government. However, it is also well established that classifications may be

set up and different individuals treated differently when those classifications are reasonably necessary to advance a significant governmental interest. Police Department of Chicago v. Mosely, supra.

To the extent that Judge Swedberg's ruling imposed a true restriction on the media, and not upon other members of the public, there is a recognition of the media's potential to impact adversely the processes of justice. It is entirely appropriate for the press to act as the surrogate for the public in observing court proceedings as indicated in Richmond Newspapers v. Virginia, supra, but in so doing they have no more right to jeopardize the defendant's fair trial rights than any other member of the

public might have. However, they do have the power and the opportunity to do it more effectively. If the petitioner is asking that a court ignore this fact and not respond to it, they are asking more than reason and experience would allow. To distinguish between media representative and the general public in this context is certainly reasonable and necessary if an effective response is to be fashioned.

CONCLUSION

For these reasons, a writ of certiorari should not be issued to review the judgment and opinion of the Washington Supreme Court.

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Petitioner's Reply Brief

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No. 81-1769

IN THE

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OCTOBER TERM, 1981

FEDERATED PUBLICATIONS, INC.,
Petitioner,

v.

HONORABLE BYRON L. SWEDBERG,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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The Response to the Petition for Writ of Certiorari ("Response") proceeds from the same fallacy that led to error in the decision below, *i.e.*, that the power to control access to a judicial proceeding is the same as the power to dictate the manner in which that proceeding shall be reported. As a result, it relies on cases involving access to courtrooms and offers no attempt to overcome the heavy presumption against prior restraints. The judicial order sanctioned by the decision below undoubtedly did tell the press what it may and may not publish; this fundamental fact has not been and cannot be rebutted by the Response.[1]

[1] The listing of affiliates and subsidiaries required by Supreme Court Rule 28.1 is found in the Appendix to the Petition for Certiorari at A-22 through A-25.

I. This Matter is Particularly Appropriate for Certiorari Review by this Court.

The Response reflects the very confusion that requires resolution by this Court. It focuses on cases establishing the power of trial courts to control *access* to hearings [2] and argues that this power includes the power to impose a "less severe" requirement that the press report on the proceedings as the trial judge required. Response, pp. 20, 7-10, 17. It is this confusion, and the assumption that control over access includes the power to control the content of reports, that this Court should address by issuance of a writ of certiorari.

The Response suggests that the issues presented by the Petition are unique and "unlikely to reoccur on any predictable basis in the future." Response, p. 7. This suggestion, however, ignores recent cases and developments in both state and federal courts. These demonstrate that the problem not only is *likely* to reoccur, but has arisen with disturbing frequency and resulted in a confusing split of authority on the two primary issues in the Petition.

The first issue involves the concept of conditioned access, which posits that because a trial court may control access to its proceedings, it may also control the manner in which they are reported. This concept is the linchpin of the decision below and has been addressed by federal courts of appeal, the highest courts of several states, and a proposed federal criminal rule. *See Sacramento Bee* v. *District Court,* 656 F.2d 477, 482 (9th Cir. 1981), *pet. for cert. filed,* 50 U.S.L.W. 3717 (1982) (suggestion that trial court seek agreement of press rather than closing trial); *In re San Juan Star,* 662 F.2d 108, 114 (1st Cir. 1981) (power to deny access not necessarily including power to condition access); *Keene Publishing* v. *Cheshire County Superior Court,* 119 N.H. 710, 406 A.2d 137 (1979) (condition on

[2] The Washington State Constitutional provision discussed in the Response at pages 8 and 9 relates to the issue of access to pre-trial proceedings, not to control of the content of reports of such proceedings. *See, e.g., Federated Publications, Inc. v. Kurtz,* 94 Wn.2d 51, 615 P. 2d 440 (1980). Thus, this state constitutional provision does not affect the First Amendment arguments the Herald has made in its Petition.

access unconstitutional prior restraint); *Edward A. Sherman Publishing Co.* v. *Goldberg*, No. 80-543-M.P. (R.I. Apr. 13, 1982) (request that press agree not to publish name of juvenile as condition to access is unconstitutional prior restraint); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure 65-75 (Oct. 1981), *reprinted in* 30 Criminal Reporter (BNA) 3001, 3019-22 (Oct. 21, 1981) (rule permitting court to condition access upon agreement to postpone disclosure of matters occurring at criminal proceedings). The decision below, these cases, and the split in authority reflected by them require the attention of this Court.

The second issue in the petition is raised by the transformation of Bench-Bar-Press guidelines into contracts enforceable as prior restraints. This issue has already reached the Court once in *Nebraska Press Association* v. *Stuart*, 423 U.S. 1319 (1975), and the court found that such a transformation is unconstitutional. *See* Petition for Certiorari, pp. 7-11. The Nebraska Supreme Court, acting prior to the full hearing by this Court, agreed that such guidelines cannot be enforced as contractual promises against the press. *State* v. *Simants*, 194 Neb. 783, 236 N.W.2d 794, 805 (1975). Nonetheless, the decision below relied upon the press' voluntary moral commitment to the Guidelines to give them binding effect as a prior restraint. While such Guidelines exist, there will always be a temptation for courts to "enforce" them. If this Court allows the temptation to be satisfied, such voluntary cooperative programs cannot survive. *See Brief of Amicus Curiae American Newspaper Publishers Association, et al.*, pp. 3-8.

The Response suggests, too, that the decision below is unique because the trial judge was merely reacting to the fact that the *Herald* "had repeatedly violated the Bench-Bar-Press Guidelines" in prior reports of other criminal proceedings. *Response* at pp. 4, 6, 7, 16, 17. This acknowledgment by the Response, however, only exacerbates the constitutional problems raised by the decision below. In essence, the Response admits that the trial judge was punishing the *Herald* for its prior "violations" by requiring it to sign an agreement or be excluded

from the hearing. Such punishment for accurate reports of events in public proceedings unquestionably conflicts with the decisions of this and other courts. *See Oklahoma Publishing Co. v. District Court,* 430 U.S. 308 (1977) (unconstitutional punishment for publication of events in courthouse); *Edward A. Sherman Publishing Co. v. Goldberg, supra* (unconstitutional to require agreement to not publish names of juvenile where newspaper previously had done so; *Oliver v. Postel,* 30 N.Y.2d 71 (1972) (unconstitutional to punish press for prior publications by exclusion from courtroom). Even without the other issues raised by the Petition, this "punishment" of the *Herald* requires the grant of a writ of certiorari by the Court.

II. The Purpose and Effect of the Order Was to Impose a Prior Restraint.

The Response argues there was no prior restraint because the Washington Supreme Court found there to be none. It also argues that Judge Swedberg's Order is distinguishable from the prior restraints before this Court in *Nebraska Press.* The first argument obviously begs the question, and the attempt to distinguish *Nebraska Press* fails because it ignores significant portions of that opinion.

The gist of the attempt to distinguish *Nebraska Press* is the theory that the case involved a trial, not a pre-trial proceeding like that involved here, and that it involved a "flat prohibition" on publication, unlike the use of the Guidelines here. Response, p. 14. It is difficult to reconcile this theory with the facts. As the opinion of this Court makes clear, all of the orders in *Nebraska Press* were imposed in the same type of pre-trial proceedings, and in conjunction with similar motions to close, as were involved in the proceedings that led to this Petition.

> The order at issue in this case expired by its own terms when the jury was impaneled on January 7, 1976.

427 U.S. at 546. Thus, the Response is in error on this point. Response, p. 14.

The Response errs, too, in arguing that the nature of the order in *Nebraska Press* was different from that imposed by Judge Swedberg. As is detailed in Mr. Justice Blackmun's In Chambers Opinion, the *Nebraska Press* order expressly incorporated Guidelines that are virtually identical to those involved in the decision below, as well as imposing other restrictions. *Nebraska Press Association v. Stuart*, 423 U.S. 1319-21 (1975) (Blackmun, Circuit Justice). *See also Nebraska Association v. Stuart, supra* 427 U.S. at 542, n.1. The only possible distinction between Judge Stuart's Order and Judge Swedberg's order is that Judge Stuart prohibited the news reports of court proceedings *except* in accordance with the Guidelines, while Judge Swedberg's agreement permitted news reports of court proceedings *only* in accordance with the Guidelines. This distinction is without substance. Both orders had the same purpose and effect of ensuring that the press reported on pre-trial hearings in accordance with the judges' wishes.

The Response also makes the curious argument that the *Herald* should not complain of a prior restraint because it might have been subjected to the "more severe" sanction of complete closure of the proceedings. Response, p. 17.[3] This argument

[3] In support of its contention that the press should be gratified that Judge Swedberg did not completely close the hearing, the Response suggests that Judge Swedberg carefully considered the alternatives to closure and made findings supporting closure. Response at pp. 3, 4, 7. This argument is unsupported by the record as the trial judge denied the motion for closure and made no such findings. Dolliver, J., *dissenting*, 96 Wn.2d 13, 30-32; Appendix to Petition for Certiorari at A-17, A-19 (citing Judge Swedberg's order, which included no such findings).

Because it could not rely on such findings by the trial court, the Washington Court supplied its own discussion of speculative problems that may arise with different alternatives to closure. It then reached the gratuitous conclusion that:

> The trial judge undoubtedly had these considerations in mind when he found that publicity with respect to the evidence considered at the supression hearing would prejudice the defendant's right to a fair trial and that there was no feasible alternative to complete closure, other than partial closure.

Appendix to Petition for Certiorari, A-5.

(footnote continues)

again ignores the distinction between control of access and control of content. A prior restraint may appear "less severe" because the press is allowed to obtain some information, but it is more insidious because of the exercise of state control over the editorial process. The immediate effect of Judge Swedberg's order may appear "less severe," but its purpose and long-term results are far more damaging. The government, in the form of a judge, arrogates to itself the editorial independence and discretion protected by the First Amendment. *See Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974) (protection of independent editorial discretion and judgment of press).

The final argument offered by the Response is that there could not have been a prior restraint because the State Supreme Court found, after the fact, that contempt might be inappropriate as a sanction for violation of Judge Swedberg's order. Response, pp. 12-13.[4] Even without the availability of contempt, however, the Response has admitted that trial judges can punish the press for "violations" of the Guidelines. A trial judge need only take advantage of a later proceeding to exclude that member of the press because of its prior "violation," as did

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(footnote continued)

This substitution of appellate "findings" after the fact cannot satisfy the requirement of this Court that the trial judge actually considering such a motion make adequate findings. *See Richmond Newspapers, Inc. v. Virginia, supra,* 448 U.S. at 580, 581 (necessity of findings); *Gannett Co. v. DePasquale,* 443 U.S. 368, 392, 393 (1979) (balancing by trial judge); *id.,* at 402, n.4 (Powell, J., *concurring)* (importance of careful consideration of alternatives); *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 563-565 (importance of findings supported by evidence).

[4] The Response also argues at several points that Judge Swedberg was simply making "an appeal to professional media ethics," Response, p. 20. This argument, however, ignores the inclusion of the *requirement* that the press follow the guidelines in a judicial *order,* Petition for Certiorari, Appendix at A-19, A-20, and the requirement in the "Agreement" that the press "follow the Bench-Bar-Press Guidelines in any reporting of the proceedings . . . ." Id. at A-16. The Herald and other members of the press were not informed at the time of the hearing and reports on it that contempt might not be a remedy for violations. The Response errs, too, in claiming that the decision below expressly held contempt was not appropriate; the decision is far from clear on that point.

the trial court and Washington Supreme Court in the decision below. Response, pp. 4-6. The Response, itself, thus confirms the fears of the *Herald* and others that would have prevented them from violating the Guidelines after signing an agreement to follow them.

The trial court undoubtedly sought to and did control the press that agreed to sign and punished the *Herald* when it would not. This is the paradigm of a licensing scheme and should not escape review by this Court.

III. The Response Fails to Respond to the Other Contentions of the Petition

The Petition for Certiorari contends that Judge Swedberg's Order created an unconstitutional condition; that exclusion of the press, based on the content of publications, is not a "reasonable limitation"; and that the selective exclusion of the press, but not the rest of the public, violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. As the Response fails to address these contentions with any contrary authority, a detailed reply is not required.

The Response lightly dismisses the argument that an unconstitutional condition was imposed by Judge Swedberg, but fails to explain why the doctrine does not apply. Response, pp. 18-20. It simply responds to this contention by repeating earlier arguments that the Order was "less severe than closure" and that the agreement to follow the Guidelines could not be enforced. Response, p.20. The Response thus does not, and cannot, rebut the basic point that the trial judge conditioned access by the press on an agreement to sacrifice constitutional rights.

The Response accepts the fundamental proposition that restrictions on access must not have a relationship to the content of speech, but appears to argue that this rule does not apply when the defendant's right to a fair trial is involved in pretrial proceedings. Response, pp. 21-22. It provides no authority, however, for this novel theory. Instead, it incorrectly relies on

Nebraska Press as a case that did not deal with pretrial proceedings or the defendant's right to a fair trial. Response, p. 22. This is clearly in error. *See* discussion at pp. 4, 5, *supra.*[5]

Finally, the Response properly acknowledges that the trial judge imposed different restrictions on the press than upon the public and that the government must offer a carefully tailored substantial interest to justify such unequal treatment affecting First Amendment rights. Response, p. 26; *Police Department of Chicago v. Mosley,* 408 U.S. 92, 99, 102 (1972). It fails, however, to explain how the differing restrictions have been carefully tailored. More importantly, it completely fails to address the holdings of this Court that the press and public are to have the same right of access to trials, where fair trial rights were at stake. *See, e.g., Richmond Newspapers v. Virginia, supra,* 448 U.S. at 572-73; *id.,* at 586 (Brennan & Marshall, J. J., *concurring); Estes v. Texas,* 381 U.S. 532, 540 (1965); *cf. Pell v. Procunier,* 417 U.S. 817, 834 (1974) (general rule that press and public do have same right of access to information controlled by government).

The failure of the Response to offer justification or authority for this disparate treatment raises particular problems because exclusion of the press, but not the public, failed to achieve the very purpose for exclusion. *See* Petition for Certiorari, pp. 22-23. An Order that is not even effective certainly cannot survive the exacting scrutiny required by the Equal Protection Clause and the First Amendment.

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[5] It is interesting that the Response tries to distinguish pretrial proceedings from trials when the very authority relied upon by the Washington court in holding that Judge Swedberg's action imposed a "reasonable limitation" is a discussion of access to *trials* in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 581, n.18.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Washington Supreme Court.

DATED: May 7, 1982.

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Respondent.

PETITION FOR A WRIT OF CERTIORIARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE

STATEMENT OF INTEREST

Allied Daily Newspapers is a voluntary trade association of 53 general circulation daily newspapers in the states of Washington, Oregon, Alaska, Idaho and Montana. During the period that the Washington Bench-Bar-Press Committee was formed and drafted its Statement of Principles and Guidelines (1963-1966), Allied Daily Newspapers was solely a Washington state association of daily newspapers, with representation on the Committee. This relationship has continued despite the evolution of Allied Daily Newspapers into a regional organization, a process which began in 1970.

In 1966 Allied Daily Newspapers formally endorsed the Statement of Principles and Guidelines as adopted by the Committee. Allied Daily Newspapers has been represented on the Committee throughout its existence. Allied's executive director has served as the Committee's secretary throughout that time, and has been the repository of the Committee's minutes and records.

The Washington Newspaper Publishers Association is a voluntary trade association of 123 community newspapers in the state of Washington, most of them published less frequently than daily. It too has been represented on the Washington Bench-Bar-Press Committee since its formation, and formally endorsed the Committee's Statement of Principles and Guidelines in 1966.

SUMMARY OF ARGUMENT

Amici file this brief to offer additional perspective on the history of the Washington Bench-Bar-Press Committee and its Statement of Principles and Guidelines, and the relationships of the state's judges, lawyers and news media organizations, so central to this petition.

Bench-bar-press programs, which have proven effective in accommodating fair trial and free press concerns, have come into being through the voluntary acceptance of self-restraint by the participating interest groups. The press, the bench and bar, each bearing responsibility for preservation of certain rights enumerated in the U.S. Constitution and the constitutions of their various states, could not and would not participate in these programs on other than a voluntary basis for to do so would be to impair those constitutional freedoms.

For a trial judge to condition attendance at a pretrial hearing on the signing of an assurance that a news media

organization will "follow" a vague and imprecise set of guidelines destroys the voluntary relationship under which they were conceived. The news media organization is faced with a prior restraint not only because there is implied the sanction of contempt citation, but also because the procedure places the journalist and his organization in the position of having to choose between giving up the right to attend and report an open court proceeding, and agreeing to report the proceeding according to standards subject to widely divergent interpretation. The very character of the bench-bar-press program, relying as it does on communication and understanding between press and judiciary, dictates against a news organization making a promise to a judge when that promise is so fraught with the likelihood of misunderstanding.

To find Judge Swedberg's procedure "reasonable" because news media organizations had previously accepted the Statement of Principles and Guidelines ignores the character of that acceptance.

News media organizations in all states where voluntary bench-bar-press programs have developed will have to reconsider their acceptance of fair trial - free press guidelines if those guidelines can be imposed as a condition precedent to court attendance, based upon their prior acceptance by the media.

ARGUMENT OF AMICUS CURIAE

I. BENCH-BAR-PRESS PROGRAMS OF THE VARIOUS STATES HAVE PROVEN USEFUL IN ACCOMMODATING FAIR TRIAL AND FREE PRESS CONCERNS.

At least 26 states have some form of voluntary bench-bar-press program established to "strengthen constitutional safeguards in the administration of criminal justice." In 23 of these states, bench-bar-press groups have entered into voluntary written agreements based on the ethical principles mutually recognized by the participants. *See Fair Trial/Free Press Voluntary Agreements,* (handbook published by the American Bar Association) (1974). As early as 1968, the American Bar Association, through its Legal Advisory Committee on Fair Trial and Free Press, announced it would encourage state initiative toward voluntary programs. In 1969, the American Society of Newspaper Editors joined with the ABA to encourage media participation in the voluntary state fair trial and free press agreements.

As Mr. Justice Brennan, concurring in *Nebraska Press Association v. Stuart,* 427 U.S. 539 at 539 (1976) observed, "Voluntary codes such as the Nebraska Bar-Press Guidelines are a commendable acknowledgment by the media that constitutional prerogatives bring enormous responsibilities, and I would encourage continuation of such voluntary cooperative efforts between the bar and the media."

Washington was one of the first of the states to bring together representatives of the judiciary, the bar and news media organizations to explore ways voluntary cooperation might serve to minimize prejudicial pretrial reporting of the criminal justice processes. At the suggestion of the

trial judges' association, the chief justice of the Washington Supreme Court invited representatives of the news media, the state bar, and the various levels of Washington courts, to meet and consider formation of an ongoing committee. It was formed early in 1964, adopted by-laws, and set about drafting a Statement of Principles and Guidelines. Each interest group was represented on the drafting subcommittees. In addition to preparing the guidelines for the Reporting of Criminal Proceedings which are at issue here, the Committee approved similar guidelines for the reporting of juvenile proceedings and civil proceedings.

This original Statement of Principles and Guidelines, "mutually drawn and submitted for voluntary compliance", later received formal approval and endorsement by the Washington State Bar Association, Allied Daily Newspapers, the Washington Newspaper Publishers Association, the Washington State Association of Broadcasters, the Superior Court Judges' Association and the Washington State Magistrates' Association.

The Committee has continued to function, meeting at least annually and usually more often. It has added to and amended the Guidelines on several occasions, although these changes have not been submitted to or been formally approved by the participating organizations. The Committee has conducted seminars on fair trial and free press issues throughout the state. The Committee has also formed a Liaison Subcommittee within its membership to serve on an on-call basis, to advise and counsel with judges, members of the bar, law enforcement agencies and news media organizations when fair trial - free press issues have threatened to precipitate confrontations.

This program has received national recognition for its success. *See Fair Trial/Free Press Voluntary Agreements, supra. See* also *APME News,* (March 1980). The programs of other states have had similar success. An opinion survey conducted by the American Bar Association in 1974, among bar officials and news media personnel in the 23 states having some form of formalized voluntary agreement for bar-media cooperation, established:

1. "The voluntary agreements are being 'generally followed'."
2. "The agreements have been 'effective in helping protect the guarantees of fair trial and free press'."
3. "The agreements have helped to 'improve bar-media relations and understanding'." *Fair Trial/Free Press Voluntary Agreements, supra* at 52.

While effectiveness is difficult to measure objectively, all of the studies of the bench-bar-press programs suggest a positive influence. Certainly this has been the experience in Washington. News media organizations in the state have cited numerous instances in which the Guidelines have influenced their coverage of criminal prosecutions. In the early years of the program there was great skepticism, but adherence to the self-restraint urged by the Statement of Principles and Guidelines was evident. Print and broadcast media became sensitive to publication or broadcast of highly prejudicial evidence prior to selection of juries. The occasional lapses inherent in a voluntary program were excused because experience taught that so long as most of the media in a community were sensitive to publication or broadcast of the highly prejudicial information, there remained an ample supply of prospective jurors in the jurisdiction – the ultimate measure of success of a bench-bar-press program.

II. AN ESSENTIAL INGREDIENT OF ALL BENCH-BAR-PRESS PROGRAMS IS VOLUNTARY PARTICIPATION – THE FREEDOM TO EXERCISE INDEPENDENT JUGDMENT.

The bench-bar-press program in Washington would never have come into being without the understanding that participation was completely voluntary. We think the same could be said of most, if not all, of the existing state programs. The press approaches restraints – even self-restraint – with a caution born of experience. No matter how sincere their interest in comity of relations with the bench and bar, journalists are loathe to commit themselves to any publicly-declared code of conduct or guidelines, application of which may, in specific instances, give rise to dispute as to whether those guidelines were honored. Furthermore, from the start of the bench-bar-press program in Washington and nationally, there has been a second and larger concern: That what has been agreed to on a voluntary basis might, in some way, be converted into a mandatory rule or order.[1]

What had been vague concerns of the news media were confirmed when Judge Swedberg, in an order from the bench, offered Herald reporters the alternative of signing a written agreement that they would "follow the Bench-

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[1]As a matter of convenience, the Committee's Statement of Principles and Guidelines have been published in desk copies of the Washington Rules of Court, but with an attendant explanation of their voluntary character. And while the Statement of Principles and Guidelines have been referred to in judicial opinions on more than one occasion, their voluntary character has been made clear. *See State ex rel. Superior Court v. Sperry*, 79 Wn.2d 69, 483 P.2d 608 (1971); *State v. Stiltner*, 80 Wn.2d 47, 491 P.2d 1043 (1971). Trial judges have on occasion made reference to the Guidelines when requesting cooperation of news media organizations. But prior to the occasion of Judge Swedberg's use of the Guidelines, they had not been the subject of any judicial orders.

Bar-Press Guidelines of 1974 in any reporting of the proceedings" in his court, or enter his courtroom only as non-reporting members of the public. Judge Swedberg's action showed a fundamental misunderstanding of the delicate nature of the bench-bar-press program. It is one thing for a journalist or news media organization to offer to exercise self-restraints. It is quite another for a judge to order a written promise to follow specific guidelines, or even to abide by a set of vague and general standards, in reporting what occurred in the courtroom. The difference is between voluntary self-restraint and judicially-imposed prior restraint – between and independent editorial decision and arrogation of that decision by the government.

The Washington Supreme Court in its majority opinion also failed to appreciate these relationships:

> Whether the contempt power of the court could in other circumstances properly extend to punishment for alleged violation of an agreement to adhere to a set of standards as nonobligatory as these is a question which has not been briefed and which we need not decide. It would, however, be contrary to the spirit and intent of the Bench-Bar-Press Guidelines to invoke such a remedy for their alleged violation, and the comments of the lower court in making its ruling indicate that the court was in agreement with that principle. It issued no orders prohibiting publication, nor did it threaten any sanctions if a person signing an agreement to abide by the guidelines should thereafter ignore them. Its ruling was simply that any media member not willing to put his moral commitment in writing would be excluded from the hearing.

96 Wn.2d at 21. It would be indeed "contrary to the spirit and intent of the Bench-Bar-Press Guidelines to invoke such a remedy" but it was just as "contrary" for the Guidelines to be employed in a court in the first place. If Judge Swedberg's use of a written and signed assurance had any meaning at all, it was to, at least for this hearing, give the Guidelines an impact greater than the self-restraint inherent in the press' support of them.

Granted Judge Swedberg made no specific mention of the power of contempt. But at the same time nothing he said sheathed that power. The Herald, and any other news media organization, would reasonably assume that, should there be disagreement as to whether its reports of the hearing conformed to the court's interpretation of the Guidelines, Judge Swedberg could cite the reporters if he so elected.

And room for disagreement there certainly was. For one example, among the many which can be conceived, the Guidelines caution:

> ". . . all concerned should be aware of the dangers of prejudice in making pretrial public disclosures of the following:
>
> (a) Opinions about a defendant's character, his guilt or innocence.
>
> (b) Admissions, confessions or the contents of a statement or alibis attributable to a defendant . . ."

If a news report of the proceeding in Judge Swedberg's court alluded to the defendant's statement, could a reporter safely assume that Judge Swedberg would credit the newspaper's staff with being "aware of the dangers of

prejudice", or must the journalist assume that the court would interpret this as a prohibition against any reporting of such a statement?

Contempt aside, it is one thing for a judge to complain that a news report seems to be at odds with a voluntary set of guidelines, and quite another for him to complain that "you broke your written promise to me." Eighteen years of bench-bar-press dialogue in Washington would have no meaning if a newspaper were to enter into Judge Swedberg's written promise with cynical disregard of this possibility of misunderstanding as to just what constitutes "following" the Guidelines. There has been a long and good faith effort on the part of all participants in the Washington program to anticipate and avoid misunderstandings, and the confrontations which so often arise from them. If a judge asks a newspaper for a unique, written promise; and if giving that promise can result in honest disagreement and unresolvable questions of good faith compliance, then that promise should not and will not be lightly given.

These considerations may not seem to be the stuff from which court rulings are ordinarily made, but we submit that they were the considerations which news media organizations had to quickly weigh, given a choice between being admitted to Judge Swedberg's courtroom the next morning or not. That some signed and some did not should not be surprising. That some perceived of this "experiment", as the Washington Supreme Court characterized it, as a very real form of prior restraint should be readily understood. *See* 96 Wn.2d at 21.

III. TO IMPOSE THE GUIDELINES ON A NEWS ORGANIZATION BECAUSE THEY HAVE BEEN ACCORDED PREVIOUS VOLUNTARY ACCEPTANCE DOES VIOLENCE TO THE SPIRIT OF VOLUNTARY ACCEPTANCE, AND IGNORES THE REALITIES OF THE BENCH-BAR-PRESS RELATIONSHIP.

Neither the Herald's, nor any other newspaper's reporting and editorial staff has ever been asked to make a formal commitment to the Guidelines. Thus the following statement by the Washington Court is based on a fundamental misconception:

> The exaction of an agreement to abide by standards which have gained the approval of all of the media of mass communications in this state was not unreasonable. . .

96 Wn.2d at 22. To characterize the Washington Bench-Bar-Press Guidelines as having "gained the approval of all of the media of mass communications in this state" does not precisely reflect history. In general, yes, the Guidelines have wide acceptance. But in the context of an agreement between a judge and a reporter, or a judge and a news media organization, this "approval" must be put in perspective. Neither Judge Swedberg nor the Bellingham Herald were signatories to the Guidelines. Both belonged to organizations which had given their endorsement to the original guidelines some fourteen years earlier. Subsequent additions and amendments had not been similarly endorsed by these organizations but had simply been promulgated by the Committee.

Even more important in this context is the lack of any agreement between Judge Swedberg and the Herald as to what the Guidelines mean. There could be wide divergences in the interpretation of the Guidelines' vague

wording and yet the Herald, by signing Judge Swedberg's "Bench-Bar-Press Guidelines Form", would be committing itself to, presumably, his interpretation of those guidelines. When the news media organizations representing the state's newspapers and broadcast stations "approved" of the Guidelines, it was with the understanding they are voluntary. When Judge Swedberg incorporated them in his order, this signalled a different understanding of their character. What other differences might there also be? An agreement presupposes common understanding of the terms of the agreement. For the "approval", on which the Washington Court relies, to be a valid basis for asking media organizations to sign this written promise, it would seem essential that Judge Swedberg go over the Guidelines in detail with the reporters, to be certain the parties to the agreement had this common understanding. No such review was provided for.

IV. IF BENCH-BAR-PRESS GUIDELINES ARE INCORPORATED IN COURT ORDERS, NEWS MEDIA ORGANIZATIONS MAY LIMIT OR WITHDRAW THEIR PARTICIPATION FROM BENCH-BAR-PRESS PROGRAMS.

If the ruling of the Washington Supreme Court is allowed to stand, signalling some significant difference between what Judge Stuart did in *Nebraska Press Association,* and what Judge Swedberg did here, there is certain to be a temptation for other trial judges to use this handy device in their courtrooms.[2] The Washington Court invites such a course by characterizing Judge Swedberg's procedure as:

[2]The American Bar Association's Adjunct Committee on Fair Trial and Free Press has anticipated this possibility. In an information manual prepared and published by the Standing Committee on Association Communications of the American Bar Association, entitled *The Rights of Fair Trial and Free Press: The American Bar Association Standards* (1981), the Committee urges:

> . . . a good faith attempt to accommodate the interests of both defendant and press which, hopefuly, would be both practical and effective as an alternative to closure.

96 Wn.2d at 21. But of course a prior restraint would always be more "effective" than closure. Left in this posture, journalists and their organizations throughout the country may well withdraw their commitment to the bench-bar-press process. In the special history of the adoption process of the Guidelines in Washington State, if a news organization's alleged prior "approval" of the Guidelines is one of the Washington Court's justifications for upholding the imposition of those Guidelines through a written agreement, then withdrawal of that approval is one obvious course which local journalists may follow. One newspaper has already done so. *See Seattle Post-Intelligencer,* (March 21, 1982, at B-6). These amici and other local press associations are actively considering taking a similar course, while continuing their participation in the bench-bar-press process.

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1. Mutual education of lawyers and news media, and, in the law and journalism schools, wider understanding of the problems and how they can be alleviated;
2. Encouragement of continuing bar-media conference groups to consider *voluntary compliance* and to discuss ways to deal with particular local problems as they arise;
3. *The exercise of caution on the part of the courts to avoid going beyond the intent of the standards and to guard against imposing upon the news media restraints not contemplated by the standards and not demanded by the requirements of courtroom decorum;* and
4. Voluntary action by law enforcement agencies to acquaint their personnel with the standards, and also to avoid withholding from the news media information about crime which the standards intend should be released promptly. (Emphasis added)

CONCLUSION

The survival of bench-bar-press programs, not only in Washington but nationwide, may depend on this Court's grant of certiorari to review Judge Swedberg's actions. Without an authoritative determination of the constitionality of those actions, journalists as well as judges and members of the bar will be left in limbo. If journalists continue to support such guidelines, can a court then impose the requirements of written agreement to them as a condition precedent to attendance at a hearing or trial? Does self-restraint by the press in following such guidelines provide a rationale for transformation of them into prior restraints? Only this Court can provide satisfactory answers to these questions.

Allied Daily Newspapers and the Washington Newspaper Publishers Association respectfully request that this Court grant the petition for a writ of certiorari to review the decision of the Washington Supreme Court.

DATED this 22nd Day of April, 1982.

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No. 81-1769

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

FEDERATED PUBLICATIONS, INC.,
Petitioner

v.

HONORABLE BYRON L. SWEDBERG,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICI CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL NEWSPAPER ASSOCIATION, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

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No. 81-1769

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STATEMENT OF INTEREST

This *amicus curiae* brief is submitted on behalf of the seven undersigned newspaper and broadcast journalism organizations in support of the petition for a writ

of certiorari filed by Federated Publications, Inc.* The organizations joining this brief represent members of the news media throughout the United States. Together the membership of these organizations includes more than 5,500 newspapers, more than 5,000 television and radio stations, all major commercial broadcast networks and more than 23,000 individuals who participate in the print and broadcast media.** The decision below adversely affects the members of these organizations by imposing judicial control over the reporting of court proceedings and by endangering cooperative efforts among judges, lawyers and media representatives to safeguard both First and Sixth Amendment rights.

SUMMARY OF ARGUMENT

In the decision below, the Washington Supreme Court upheld a trial court's order requiring members of the news media to agree to follow the Washington Bench-Bar-Press Guidelines (the "Guidelines") in reporting the proceedings. The court excluded from the courtroom any member of the press who would not agree in writing to do so. However, it imposed no restriction on attendance by the public who were not members of the press.

The decision below condones an unconstitutional prior restraint on the First Amendment freedom of the press. It attempts to control the content of what the press*** reports by requiring the press to agree to unconstitutional restrictions as a condition for access to court proceedings. The decision also ignores this Court's holdings that the press's right of access to court proceedings is at least as great as that of the public.

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* A copy of the written consent of the parties is being filed with this brief, pursuant to Rule 36.1 of this Court.

** A description of each organization is included in the Appendix hereto at A-1.

*** As used herein, "press" includes both print and broadcast media.

The decision by the Washington Supreme Court is profoundly disturbing, and should be reviewed by this Court, because it will encourage courts to transform voluntary press guidelines into mandatory prior restraints on the press. The decision below will also deter judges, lawyers and members of the media from discussing and developing voluntary guidelines for press coverage of court proceedings. Members of the news media will be unable to continue their participation in such cooperative efforts if voluntary guidelines are permitted to become tools for government control of the press.

ARGUMENT

I. The Decision of the Washington Supreme Court Undermines Voluntary Cooperation Among Members of the Bench, Bar and Press Concerning Reporting of Criminal Proceedings.

The decision below fundamentally misconceives the relationship between the courts and the press and the role that voluntary codes of behavior, such as the Guidelines, can play in that relationship. As a result, the decision threatens to destroy the results of nearly twenty years of cooperative efforts by responsible representatives of the judiciary, the bar and the press to protect the interests of criminal defendants and the press in reporting of court proceedings.

In 1966, the American Bar Association's Advisory Committee on Fair Trial and Free Press recommended procedures to deal with what that committee saw as problems inherent in press coverage of criminal proceedings.* Those measures included severe restrictions on press access to and reporting of criminal proceedings.

A special committee of the American Newspaper Publishers Association (ANPA) published a separate re-

* ABA Advisory Committee on Fair Trial and Free Press, *Standards Relating to Fair Trial and Free Press* (1966).

port (the "ANPA Report")* which rejected "any covenants of control or restrictions on the accurate reporting of criminal matters, or anything that would impair such reporting." ANPA Report at 10. The report noted that the impetus for attempts "to have the news media subscribe to codes or guidelines or statements of principles . . . ha[d] been generated almost entirely by the legal profession and with particularity by various state or city Bar Associations." *Id.* at 95. It further observed that "there ha[d] been no widespread acceptance by any substantial number of news media of [these] restrictions." *Id.* at 96.

The ANPA Report recommended, however, "that the press stand at any time ready to discuss these problems [of possible conflicts between First Amendment and Sixth Amendment rights] with any appropriate individuals or groups." *Id.* at 10. Many publishers and broadcasters, together with judges and lawyers, have joined state and local conferences and committees that provide participants an opportunity to gain a greater understanding of each other's interests and concerns. This improved understanding has enabled participants in some of these "fair trial-free press" conferences to reach agreement on *voluntary* recommendations, such as the Guidelines, for the coverage of criminal cases.

As of April 1, 1982, such proposals had been adopted by bench, bar and media organizations in twenty-eight states.** These voluntary efforts have been described as "a commendable acknowledgment by the media that constitutional prerogatives bring enormous responsibilities." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 613 (1976) (Brennan, J., concurring). A survey of bar officials and news media personnel conducted by the American Bar Association concluded that:

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* American Newspaper Publishers Association, *Free Press and Fair Trial* (1967).

** A list of the states in which guidelines have been adopted is included in the Appendix hereto at A-3.

> "voluntary agreements have generally worked well, . . . have helped improve bar-media relations in the states having agreements, and also have helped improve fair trial protections without impairing press freedom."*

The press has supported these guidelines because they were voluntary — because they recognized that "the decision of what, when, and how to publish is for editors, not judges." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 613 (Brennan, J., concurring); *see also id.* at 560-61; *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 259 (1974) (White, J., concurring).** The decision below, which converted the voluntary Guidelines into a restraint on publication, threatens the continuation of these cooperative efforts to resolve the tension between First Amendment and Sixth Amendment interests.

Press and bar organizations have already begun to react to the decision below. The American Bar Association/American Newspaper Publishers Association Joint Task Force on Press/Bar Relationships and Fair Trial/Free Press Issues has adopted a resolution "deplor[ing] the use of such voluntary guidelines to condition access or restrain news reporting." The *Seattle Post-Intelligencer,* the newspaper with the

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* ABA Legal Advisory Committee on Fair Trial and Free Press, *Fair Trial/Free Press Voluntary Agreements* 49 (1974).

** The American Bar Association also has recognized the importance of leaving control of the content of reporting in the hands of the press. Standard 8-3.1 of the ABA Standards on Fair Trial and Free Press, as amended in 1978, provides:

> "No rule of court or judicial order shall be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case."

ABA Standing Committee on Association Communications, *The Rights of Fair Trial and Free Press: The American Bar Association Standards* 43 (1981).

second-largest circulation in Washington, has withdrawn its formal support and adherence to the Guidelines.* Other newspapers and broadcasters throughout the United States may be forced to take similar action if the decision below is allowed to remain a precedent for other courts.**

If the decision below is not reversed, other courts will impose similar orders. When, as in the trial court below, a court cannot find the overriding interest necessary to grant a motion for closure, it may view guidelines, voluntarily subscribed to by the press, as an invitation to impose a mandatory restraint on publication. Indeed, as happened below, guidelines may serve as a ready-made prior restraint that eliminates even the burden of drafting a gag order tailored to the facts of the case. A trial court's perception of such a restraint as "a good faith attempt to accommodate the interests of both defendant and press," *Federated Publications, Inc. v. Swedberg*, 96 Wash. 2d 13, 20, 633 P.2d 74, 78, Pet.App. A-8*** (1981), will increase the propensity to use guidelines in this way.

The present case is not an isolated incident. In the *Nebraska Press Association* case a Nebraska trial court transformed that state's guidelines into a mandatory restraint on the press, until Justice Blackmun stayed enforcement of that provision. *Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1330-31 (1975) (Blackmun,

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* Editorial, "Press Guidelines lose P-I support," Seattle Post-Intelligencer, Mar. 21, 1982, at B6, col. 1.

** Even before this decision and the decision of the trial court in *Nebraska Press Association*, many media representatives refused to support voluntary guidelines because of their fears that such guidelines would be used to restrict First Amendment rights. *See, e.g.*, ANPA Report at 8-9 ("the adoption of codes of conduct . . . must be rejected"). The decision below confirms these fears.

*** References herein in the form "Pet. App. A-____" are to the Appendix to the Petition for a Writ of Certiorari to the Supreme Court of the State of Washington, dated March 23, 1982.

Circuit Justice). Recently, on April 13, 1982, the Rhode Island Supreme Court vacated an order barring reporters for one newspaper from all hearings involving juveniles unless the newspaper agreed in advance not to publish the names of the juveniles. *Edward A. Sherman Publishing Co. v. Goldberg*, No. 80-543-M.P. (R.I. April 13, 1982).

Similar cases have arisen in federal court. In *Sacramento Bee v. United States District Court*, 656 F.2d 477 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3717 (Jan. 29, 1982) (No. 81-1563), the Court of Appeals for the Ninth Circuit refused to issue a writ of mandate although it acknowledged that the trial court had erred by excluding the press, but not the rest of the public, from a criminal proceeding. In addition, the Court of Appeals suggested that a "logical and workable alternative" would have been for the press "to acknowledge that immediate publication was unnecessary." 656 F.2d at 482.*

A recently proposed amendment to the Federal Rules of Criminal Procedure would increase the likelihood that trial courts will resort to prior restraints and to content-sensitive restrictions on access as "alternatives" to closure. Proposed Rule 43.1** would permit a court to condition attendance at a proceeding "upon agreement to the court's order restricting the time at which persons in attendance may disclose to others matters occurring at the proceeding or portion thereof partially closed." 30

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* The Court of Appeals noted that there is a difference between "a voluntary agreement with the press about the timing and scope of coverage," 656 F.2d at 482, and "a gag order restraining the press from publishing information." 656 F.2d at 483 n.4. The present case demonstrates, however, that a trial court can easily transform a voluntary agreement into a mandatory gag order.

** Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure 65-75 (Oct. 1981), *reprinted in* 30 Crim. L. Rptr. (BNA) 3001, 3019-22 (Oct. 21, 1981).

Crim. L. Rptr. (BNA) 3001, 3020 (Oct. 21, 1981). The proposed rule purports to limit this authority to occasions when "the court could otherwise order closure." *Id.* The rule would, however, encourage courts to find closure justified in borderline cases in order to allow them to make mandatory the kind of "voluntary" agreement advocated in *Sacramento Bee*. The result will be a plethora of prior restraints in the guise of access "compromises" in circumstances where no restriction on either access or publication is justified under this Court's decisions.

II. The Decision of the Washington Supreme Court Conflicts with Decisions of This Court and Must Therefore Be Reversed.

Review of the decision below is necessary not only because it endangers bar-bench-press cooperation nationwide, but also because it is inconsistent with this Court's prior decisions on critical First Amendment issues of prior restraint and access to court proceedings. The decision demonstrates an insensitivity to the First Amendment interests which this Court has repeatedly held to require careful protection.

A. The Decision Below Imposes an Unconstitutional Prior Restraint on the Reporting of Court Proceedings.

In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the trial court incorporated the Nebraska Bar-Press Guidelines in an order restricting publication of information about a criminal prosecution. In what this Court termed a "careful decision on this difficult issue," *Nebraska Press Association, supra*, 427 U.S. at 544 n.2, Justice Blackmun observed that the "wholesale incorporation" of such guidelines in a court order was the "most troublesome aspect" of that case. *Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1330-31 (1975) (Blackmun, Circuit Justice). He therefore stayed application of that portion of the order.

The Nebraska Supreme Court subsequently modified the lower court's order to eliminate the incorporation of the bar-press guidelines. *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975). Thus the order which was reviewed and reversed by this Court did not include that provision. Nevertheless, this Court held that the order, as modified, still violated the guarantees of freedom of speech and of the press.*

The order issued by the trial court here imposed a more onerous burden on the press, and had less basis, than the order which finally came before this Court and was held unconstitutional in *Nebraska Press Association*. Without any factual findings, the court simply decreed that all members of the press, but no other members of the public, who attended the hearing must "sign a form indicating that they have read and understand the Bench-Bar-Press Guidelines of 1974, and will follow those guidelines in reporting on the hearing in this case." Order on Omnibus Motions, quoted in *Federal Publications, Inc. v. Swedberg, supra*, 96 Wash. 2d at 31, 633 P.2d at 83, Pet. App. A-19 (Dolliver, J., dissenting).

Even if it could be assumed that the trial court did not intend to impose formal sanctions for violation of the agreement, the "substance" and "effect" of the order was to impose a prior restraint.** *See Near v. Minnesota*, 283 U.S. 697, 708 (1931). *Cf. Bantam Books, Inc. v. Sul-*

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* Three members of the Court believed this all prior restraints were constitutionally impermissible in the context of criminal proceedings. *Nebraska Press Association v. Stuart, supra*, 427 U.S. at 572 (Brennan, Stewart, and Marshall, JJ., concurring in judgment). Two other Justices indicated that they might be willing at some future time to join in such a holding. *Id.* at 570-71 (White, J., concurring); *id.* at 617 (Stevens, J., concurring in judgment).

** The order also violated the equal protection clause of the Fourteenth Amendment by imposing a prior restraint on the press while imposing no restriction on dissemination of information about the hearing by other members of the public.

livan, 372 U.S. 58, 66-67 (1963) (absence of formal sanctions did not save state commission's activities from invalidation as system of prior restraints). As the trial court intended, the order was a more effective "method of securing compliance" than the "mere oral commitment" which the court felt "had not sufficed to produce . . . restraint" in previous reporting. *Federated Publications, Inc. v. Swedberg, supra*, 96 Wash. 2d at 20, 633 P.2d at 78, Pet. App. A-8.

Indeed, the Rhode Island Supreme Court recently decided that an order similar to the one upheld below was unconstitutional. In *Edward A. Sherman Publishing Co. v. Goldberg*, No. 80-543-M.P., slip op. at 10-11 (R.I. April 13, 1982), the court held that an order conditioning a reporter's attendance at juvenile proceedings upon "agreeing in advance not to publish the name of the juvenile is . . . an unconstitutional prior restraint on the press." The order of Judge Swedberg here was similarly invalid.

B. The Court Below Unconstitutionally Conditioned Access by the Press to a Criminal Proceeding Open to the Public.

The trial court's refusal to accord the press the same unconditional right of access as the rest of the public conflicts with prior decisions of this Court. Those decisions establish that the press's right of access to court proceedings is at least as great as that of the general public. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion per Burger, C.J.) ("media representatives enjoy the same right of access as the public"); *id.* at 586 n.2 (Brennan, J., concurring in judgment) ("the media's right of access is at least equal to that of the general public"); *Estes v. Texas*, 381 U.S. 532, 540 (1965) (newspaper, radio and television reporters "[a]ll are entitled to the same rights as the general public"). Because the pretrial hearings below were

open to the public, the order excluding reporters who refused to sign the court's agreement violated the rights of freedom of the press and equal protection guaranteed by the First and Fourteenth Amendments.

The restriction on the press's right of access cannot be justified as a "reasonable limitation" on that right. The cases cited above make clear that any such limitation must preserve at least the same right for the press as for the general public. Moreover, any limitation on access may not "deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions. . . ." *Richmond Newspapers, Inc. v. Virginia, supra,* 448 U.S. at 581 n. 18. The restriction imposed below violated this precept by discriminating against those who would not agree to government-imposed restrictions on such communication and discussion. *See In re San Juan Star,* 662 F.2d 108, 114 (1st Cir. 1981) ("The power to deny access altogether does not necessarily allow a court to impose any condition upon access that it wishes—particularly when the condition at issue has an impact on separate constitutional concerns.")

CONCLUSION

The decision of the Washington Supreme Court invites trial courts throughout the country to restrict the press's reporting of criminal proceedings. The use of previously voluntary guidelines to censor the press and restrict its access to the courtroom not only infringes the constitutional rights of freedom of speech and of the press, but also perverts the cooperative purpose and spirit of bench-bar-press committees. Review of the decision below is essential to protect First Amendment rights and to preserve the accomplishments of responsible judges, lawyers and media representatives throughout the country.

Dated: April 22, 1982

Respectfully submitted,

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Appendix

Description of Amici Curiae

The American Newspaper Publishers Association is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The American Society of Newspaper Editors ("ASNE") is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and "the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people."

The National Association of Broadcasters (NAB) is a nonprofit incorporated association of radio and television broadcast stations and networks. As of March 10, 1982, NAB's membership included 4,679 radio stations, 676 television stations and all the major commercial broadcast networks.

The National Newspaper Association is a trade association consisting of more than 5,500 weekly and daily newspapers located throughout the United States. A major purpose of the Association is to preserve the constitutional guarantee of freedom of the press for community newspapers.

The Radio-Television News Directors Association ("RTNDA") is a nonprofit professional organization of journalists. RTNDA includes approximately 1,700 members who are active at the network and local levels in the supervision, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment and freedom of information interests of the press. It has provided representation, information, legal guidance or research in virtually every major press freedoms case that has been litigated since 1970.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 28,000 members representing every branch and rank of print and broadcast journalism. It is, in fact, the largest, oldest, and most representative organization of journalists in the United States. Among the Society's purposes is its commitment to ensure that the public's business be conducted in public.

States with written guidelines, as of April 1, 1982:

Alabama	New Mexico
Arizona	New York
California	North Carolina
Colorado	North Dakota
Delaware	Oklahoma
Georgia	Oregon
Idaho	Pennsylvania
Kentucky	South Carolina
Louisiana	South Dakota
Massachusetts	Texas
Minnesota	Utah
Missouri	Virginia
Nebraska	Washington
New Jersey	Wisconsin